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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

HARPER & ROW PUBLISHERS, INC. and
THE READER'S DIGEST ASSOCIATION, INC.,

Petitioners,

VS.

NATION ENTERPRISES and THE NATION
ASSOCIATES, INC.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

JOINT APPENDIX
(Volume II — Pages JA-359-JA-715)

EDWARD A. MILLER
c/o HARPER & ROW, PUBLISHERS, INC.
Attorneys for Petitioners
10 East 53rd Street
New York, New York 10022
(212) 207-7116

FLOYD ABRAMS
CAHILL GORDON & REINDEL
Attorneys for Respondents
Eighty Pine Street
New York, New York 10005
(212) 825-0100

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(Question read.)

THE COURT: Treat that question as asked, to "writing" that article as you did, Mr. Navasky.

A I might put it differently, but yes.

Q Even though the context of the Ruth memorandum was not new detail in an absolute sense, and a statement read over the telephone to General Haig was not new detail [496] in an absolute sense, you considered these to be new anyway because these struck you as new in terms of the consciousness of the average reader, is that right?

A No. I considered them to be news, in the configuration of both the events that I described in The Nation article and in the context of the

politics and political atmosphere of 1979.

Q I think I just read to you a portion of page 87, starting at page 86. On lines 11 through 13 it says,

> "Those three events struck me in reading the manuscript as things which were new in terms of the consciousness of the average reader."

A The news consciousness.

Q Yes, news consciousness of the average reader.

A Yes. I considered them news.

Q Didn't you also consider these as new detail because of your view, and I am quoting you now, that they had never been carried as news stories at the time so that the public was not aware of them?

A It is my testimony now and what I meant to say then, and I think

what I said then was, the public was not aware of those documents, and I was not aware of those documents and the serious student of Watergate, who is not a specialist, may not have been aware of those [497] documents in the way in which one was aware of Mr. Kissinger praying with Mr. Nixon as publicized by Woodward and Bernstein, in the way in which one was aware of the fact of the pardon itself, in the way in which one was aware of President Nixon's last words to his staff after he resigned -- those documents had not penetrated the public's consciousness.

I would not have been interested in publishing them, however -- even though I believe they are newsworthy and I believe that we had the right to publish

them -- I would not have been interested in publishing them if they did not speak to me in conjunction with the other elements of this article and say that there was a possible obstruction of justice at the highest levels of government. And it's the whole thing together that constitutes news, and you can quote a page, or two pages of my deposition and leave out seven others, and embarrass me here, but that is what I really meant to say there. And I think if you read the thing all the way through, that is what it says.

Q But did you state,

"But they had never been covered as news stories at the time so that the public wasn't aware of them"

from page 87 of your deposition, lines 18 and 19?

A I'm sure I said that, but I said it in conjunction with the other statement that you read me that they hadn't [498] penetrated the news consciousness, and by that I mean, you know, there may have been a little news story here and there, but they hadn't penetrated the news consciousness as the thing that speaks best for what I meant to say.

Q So it is your testimony that they had never been covered as major news stories before the publication of your April 7, 1977 article?

A I wasn't aware of it.

Q You weren't aware of it?

A That's right.

MR. ZISSU: I am going to mark some exhibits for identification.

Q First, I want to hand you some things. First, I want to hand you a microfilm copy of a newspaper article.

THE COURT: Is there a tag on it?

MR. ZISSU: Not yet. This is for cross. Plaintiffs' Exhibit -- let me get a tag.

(Pause.)

(Plaintiffs' Exhibit 49 was marked for identification.)

MR. ZISSU: They are microfilm copies of portions of The New York Times dated Friday, October 16, 1974.

Q Do you recognize that, Mr. Navasky? [499]

A Well, I recognize what it is.

Q Do you read The New York Times?

A Yes, I do.

Q Do you remember reading this article and this material?

A Generally. Not specifically.

Q Do you recall that President Ford on the day before testified before the Hungate Committee?

A Generally.

Q Do you know whether he went on national television when he did so?

A Yes.

Q What would you call the type of headline that is carried by The New York Times? Is that a banner headline?

A Yes, I would call it, though, the reverse of the story that I wrote. The headline says there is no deal and I wrote a story --

Q Mr. Navasky, we are identifying a document. I don't want a

speech or an argument. If you have to have one, your counsel can redirect.

A Right.

Q I don't want to argue with you, I'm sorry. Is it still your testimony that the Hungate Committee -- let me ask you another question. [500] If you look through those materials, is there a New York Times editorial there of the same day?

A I am still on the front page, and I haven't gotten to the part that you are suggesting penetrated the news consciousness. [501]

Q I am not going to ask you to read the whole thing.

A Okay. I don't see it on the front page.

Q If you look through the --

A I am sure I will come to it.

Q What?

A I imagine I will come to it, but I haven't yet.

Q Do you see an additional article to the lead article by name M. Naughton of The New York Times?

A Yes.

Q Called "History Played Out on Familiar Stage"?

A Yes, I do.

Q Do you see a couple of pages further an article entitled "Ford Before Panel" by John Herbers?

A Yes, I do.

Q Do you see further on "Testimony Contradicts Accounts on Haig"?

A Yes, I do.

Q By Phillip Shabeloff?

A Yes.

Q Thereafter do you see The New York Times editorial "The President Testifies"?

A I do. [502]

Q Do you see the James Reston piece entitled "Don't Sell Ford Short"?

A I do.

Q Is it still your testimony that Mr. Ford's appearance before the Hungate Committee was covered only by little fillips or had little coverage in the news?

MR. ABRAMS: I object to the form of the question. The witness did not so testify. The witness has not been given a chance to read the articles, anyway, if Mr. Zissu really wants him to.

Q I think it was in your

deposition you said it had not been covered in the press. Is that still your testimony?

A That the hearings themselves had not been --

Q Covered?

A Why don't you read me my statement?

THE COURT: I will overrule that objection in light of page 87.

Q Lines 18 and 19:

"But they had never been covered as news stories at the time so the public wasn't aware of them."

A I thought what I was saying there was in reference to whether the documents you were asking me about had not been covered at the time, and so the public was not [503] aware of them. That's all I can say. I obviously was

aware the pardon by one president of another was a major news story and still believe it continues to be one.

MR. ZISSU: I mark as Exhibit 50 for identification a similar microfilm copy of portions of the front page of The Washington Post of Friday, October 18, 1974.

THE COURT: The first meeting with Haig and the second and the follow-up phone call are in the Times of October 18th, both of them.

THE WITNESS: Right.

THE COURT: So the only thing in the Times of the three items recited is the Ruth Memorandum?

THE WITNESS: I would respectfully argue, your Honor, that that may go to what I said in answer to a specific

question at deposition. It does not go to the question of whether the story we wrote was a newsworthy story, because they are in The Times buried, and I talked about a news consciousness. They are in The Times. That is not the headline in The Times. The headline is, "No Deal Made." That is the headline I remember in The New York Times. You have to read far into the story to get into those particular documents. Once you get them they are in the context [504] of "No deal" and what is newsworthy to me is the context in which I put them in the story in "Behind the Nixon Pardon."

THE COURT: The question from counsel on the deposition was whether these items were new detail. You said,

yes, they are, and you said they had not been covered as news stories and yet those two items of detail are in fact covered in the story.

THE WITNESS: Well, I concede that, and as I say to me they did not penetrate the news consciousness of most people, including myself.

THE COURT: Including yourself?

THE WITNESS: Yes. And, as I said, had I known that, I would have written this story but I would have said despite the fact these documents were released before and reported on before, they have not been scrutinized in this context, and that the advent of the new information that President Ford provides in "A Time to Heal," including the conversations with Hartmann, Marsh, and

Harlow, makes one -- causes one to reevaluate them and put them higher up, in effect.

THE COURT: What did that add, the conversations with Harlow and Hartmann, in your judgment?

THE WITNESS: To me, your Honor, it adds [505] two things. The first says that three of the people most intimately involved with the process the way only staff people can be, felt that this conversation that he had with Haig had either -- had at a minimum the appearance of impropriety, or, as they call it, trouble, or as they call it, a time bomb.

THE COURT: They thought that he, by letting Haig go out of the office without saying anything, he might have left the impression that he was --

THE WITNESS: Made a deal.

THE COURT: No, that he was not uncomfortable with the suggestion. That is the way it was put in the book.

MR. ABRAMS: There is more in the book. I don't want to lead. May I suggest to you the bottom line of that paragraph.

THE COURT: That is what Mr. Hartmann says.

MR. ABRAMS: I don't want to tell Mr. Navasky, but I suggest you direct your attention to the last line.

THE COURT: I will let you deal with those things on redirect, if necessary. In the Hungate hearings is not the same thought conveyed by the President's testimony where he says, at page 95, "I had not given any advice or

recommendations [506] in my conversations with his aides," which means Haig, among others, "but I also did not want anyone who might talk to the President to suggest tht I had some intention to do so." Now, that is a suggestion that he's saying, "I didn't want anybody to take the fact that I had not said anything to be a recommendation," right?

THE WITNESS: My memory of the Hungate testimony, your Honor, is --

THE COURT: That is what I am reading to you.

THE WITNESS: In context it was that he made the reader and the listener feel it was his idea to go back and make the phone call, and that he may have had one conversation with St. Clair but that it was his idea to do this. And what my

reading of the manuscript told me was that he had three of his most trusted aides who were alarmed to the point of using language like time bomb, and suggesting that he might have made a deal. Silence implies assent. Which was what was new and what made this thing in the politics of 1979 worth resurrecting these documents from page -- wherever they ended up inside The New York Times -- to page 1.

THE COURT: Two thoughts then. One, you [507] did not list that as a new detail that sprang to your mind when you read this article and read the typescript in April of 1979.

THE WITNESS: That's correct.

THE COURT: Then may I ask you what is it about the fact that an advisor

calls this to his attention that makes it of this supervening news quality as opposed to it having come to him on his own reflection? What is the difference?

THE WITNESS: Well, if you accept, as many people may, a majority of people may, President Ford's own version of what happened, which is the way you characterized it in your question to me, then it would be of limited significance. But if you accept the possibility that either there was an obstruction of justice or if you accept the view of Harlow, Marsh and Hartmann that it had the appearance or the possible appearance of a deal, then one learns that it was not -- two possibilities. Number one, it was not Ford's own idea to do it, and number two, he might not

have called back. There indeed might have been a deal and no subsequent conversation had it not -- with Haig -- had it not been for his conversations with these three aides. So that history might have taken a whole other course.

[508]THE COURT: But the fact that was revealed in 1974 was that he had the conversation with Haig, and Haig left without getting any response. That's where you say you saw the potentiality of an obstruction of justice.

THE WITNESS: That's correct. [509]

THE COURT: Whether or not you are right in that surmise, the fact is that he made it perfectly clear the next day in a phone call to Mr. Haig that he was not making any deals with him?

THE WITNESS: Right.

THE COURT: That, too, is an undisputed fact. The only question that is open is in the meantime whether or not he, on his own, or he, at the suggestion of some aide came to the view that the phone call to Haig should be made. Now, I am saying to you what difference does it make when on his own he came to that view or whether some aide called it to his attention and said, "Mr. Vice-President, you better disavow this because the implications are ones that are troublesome." What difference does it make whether the aide says that and he is thinking about it and he says, "You know, you let Al go home and he might be reporting on this, and I'm not sure I'm happy with that." What's the difference?

THE WITNESS: First, let me say --

THE COURT: To make it newsworthy enugh to publish the article?

THE WITNESS: I think it's appropriate that [510] we publish an article about that whether or not it made a difference, but I want to tell you what I think the difference is. I think the difference is that there is a third possibility which you haven't mentioned, and which is that there was -- let me say The Nation is not a magazine which easily adopts conspiracy theories. We don't believe the assinations were conspiracies, we reject most conspiracy theories. Nevertheless, occasionally there are deals made in high political places, arrangement, etc. What this raised for me was the possibility that a

deal was made and that it was not as President Ford suggested, that he called back and meant what he said in conversation No. 2. There is the possibility that this second conversation, after talking to his aides, was made for the record pro forma so that he could say he put in that there was no deal when in fact there may have been a third phone call to General Haig, which none of us know about, or a private conversation with General Haig saying for the record I am going to read you this statement but you go ahead and proceed as planned.

Now, I raise that third possibility, and I did not raise it in the article because it's remote enough so I didn't feel comfortable. I did not have a [511] chance to go back to the record --

THE COURT: And you have no evidence?

THE WITNESS: I have no evidence, except I have the statements of these three aides which to me -- I was as troubled by them as they were troubled by Ford's silence -- and to me that is appropriate news in the politics of 1979, because you have two candidates for the Presidency of the United States who might have been involved in a deal, and you, your Honor, don't accept this as proof that they are involved in a deal, I don't invoke it as proof that they were involved in a deal, but I do see it as raising the possibility that they were in a newsworthy enough context that I reported it. Not only did I report it, but what we reported was then

picked up in other newspapers because they saw it as newsworthy, and the Reader's Digest reported it because it saw it as newsworthy. So that would be to me validating it.

THE COURT: You don't mean to suggest that in its being picked up in any way there is any conspiratorial aspect here?

THE WITNESS: By "conspiracy" I mean a deal, that there was something else going on beyond what [512] Ford admitted to in his memoirs. I don't say that there was. All I say was that that conversation raised the possibility of an obstruction of justice, of a deal, and I felt it was real enough to write a story off of it.

I believed at the time that the

Haig conversation was news, and it turns out it was not news in the sense that it was on the record before. I still believe it was news in the sense that in the configuration of these events in that '79 context it was new information to the public who were trying to make an evaluation of their presidential candidates.

THE COURT: Can I ask you whether it occurred to you that equally with your theory it was entirely possible that Ford was thunderstruck at what Haig said to him and was frankly just sitting their listening, taking it in?

THE WITNESS: Your Honor, it did --

THE COURT: And after Haig had walked out he then began to assess the pieces and put them together. Is that entirely possible?

THE WITNESS: That is entirely possible. But it wasn't the implicit argument of the piece that I [513] wrote.

THE COURT: I understand that.

THE WITNESS: Okay.

* * *

[517]

Q I would now like to read to you some further portions from your deposition, Mr. Navasky, relating to your testimony yesterday, and ask you if you were asked these questions and gave these answers starting at page 37, line 2 and continuing through -- line 15, I am sorry, continuing through to page 39, line 2:

"Q What was your purpose in publishing the article?
"A The article in my judgment was extremely newsworthy and it was news with policy significance. That's what we try to do every week, publish articles that are newsworthy and have policy significance.

"Q What do you consider the news?
"A The news in my judgment was that President Ford had had a coversation with Alexander Haig that was possibly an impropriety at the highest level of our government because it suggested there was possibly an obstruction of justice in the transaction. And what was particularly newsworthy was that in the book there [518] were documents that Ford quoted from that, as far as I was aware of at the time -- I have since discovered that they are in the Congressional Record -- were being published for the first time that confirmed his account.
"Q Are there portions of your article that go beyond references to those conversations?
"A Yes.There were other pieces of news. There were other tidbits of news in the book, so I used some of them, not all of them, in the article.
"Q You mentioned documents that are referred to in the article that you have since learned were available in the Congressional Record.
"A Some of them were.
"Q What documents at the time did you believe were unavailable to the public?
"A I still think this one was unavailable. The one I cited from Henry Ruth, Jaworski's assistant I quoted in the article. In addition, the thing that was so striking to me was the written statement that Ford read to Alexander Haig after his conversations with his aides saying that

he has no intention of recommending what the President should do about resigning or not resigning, after they had had a conversation the previous day on that matter." [519]

Were you asked those questions and did you give those answers? Yes or no, please.

A To the best of my recollection, yes, but I would have to see it before me if you want me to give you a yes or no.

Q At page 83, on line -- starting on line 17.

A Excuse me, this is my testimony yesterday?

Q Your deposition testimony.

A I see. [520]

Q Page 83 commencing at line 17:
"Q If the information" --

A Could I --

Q Do you want a copy?

A I would like a copy if you are going to ask me follow-up questions about it, yes.

Q I am not sure I will. I am just asking whether you gave that testimony at this point.

THE COURT: What's the page?

MR. ZISSU: Page 83, your Honor, of the deposition.

THE WITNESS: If you say I gave it, I will assume I gave it. I assume you are an accurate reader. I really want it in front of me to make sure it is in context if I am going to be asked anything about it beyond that.

MR. ZISSU: We will try to do that.

Q Page 83:

"Q If the information, the same information was to have been disclosed some four or five weeks later one way

or another in a publication, what was the policy significance on the hot news aspect of it in your view that would have led you to feel you needed to publish it three or four weeks in advance? [521]
"A When I said -- if that's what I said -- to Mr. Fish, 'I think we have a real hot news story here,' I wasn't referring to the possible appointment of Edward Bennett Williams at the head of CIA. I was referring to the story about the pardon of the former president, Richard Nixon, by Gerald Ford and the possible obstruction of justice and the memoranda that we reproduced in the magazine. That seemed to me to be the hot part of the whole story."

Through line 6. Mr. Navasky, have you had a chance to read overnight Plaintiffs' Exhibit 48 and 49 for identification, the two newspaper articles, one from The New York Times and the other The Washington Post?

A Yes, I have.

Q And I believe yesterday you testified that the press did not give

the possibility of a deal on the pardon particular scrutiny and that the revelation of Mr. Ford's discussions with his aides made the possibility of a deal new in 1979. Is that still your testimony?

A I would have to look at the exact language but --

Q Did you read it overnight? [522]

A Yes, I did.

Q Is it still your testimony that the press didn't give scrutiny to the possibility of a deal?

A It is my testimony that the coverage of the press that I read overnight, that you gave me, would have confirmed me in my judgment that what we published in 1979 was newsworthy and that the news consciousness of the general public, as informed by the articles

you gave me, would not have included any knowledge that President Ford read a written statement to General Haig, that -- there were all kinds of new details in the book that I included --

Q I asked you about the possibility of a deal on the pardon. Is it your testimony that the press did not give scrutiny to that potential or alleged impropriety in those articles that you read?

A It is my testimony that the headline on those articles was the thrust of those articles. That there was no deal. And that you have to read very far down in the article to get any sense of what the argument was about, and even after you read that far, you didn't get a sense that really was a

possible obstruction of justice. That I got from the book.

Q Is there any way of giving more emphasis [523] to the lead story than making it the lead story with a banner headline?

A No.

Q And isn't it true that the lead stories in most major newspapers are frequently continued on subsequent pages?

A Yes.

Q They can't put the whole story, if it is a long one, on the front page?

A That's correct. But one's news consciousness is determined by, in inverse proportion to the placement of a fact in a news story and that's why you

put the most newsworthy things at the top and the least newsworthy things at the bottom. The critical point, as any newspaper man will tell you, is the jump, what is before the jump and after the jump. In this case what happens is the most material facts that I have since learned after my deposition and after we ran our story, that were in the book, that were not in the newspaper, are not in the newspaper coverage at all. [524]

MR. ZISSU: I want to mark as Plaintiffs' Exhibit 51 -- that was 49 and 50 yesterday. This is 51 for identification; a photocopy of a New York Times article by Herbert Mitgang, dated April 4, 1979.

Q I want to shown it to you, Mr.

Navasky, and direct your attention to some red lining.

(Pause.)

Q Can you read to me --

MR. ABRAMS: Do you have a copy, Mr. Zissu?

MR. ZISSU: I don't have a copy.

MR. ABRAMS: Do you mind if I go up to the witness?

MR. ZISSU: No, I don't.

(Pause.)

Q Could you read the language where the red lining is?

A "The material summarized for the Ford book has for the most part been reported previously in the press."

Q That is a reference to The Nation article, is it not?

A That is unclear, but you can read it as easily as I can, I assume.

[525]Q The story is about Mr. Navasky article, is it not, in The New York Times?

A Yes, it is.

Q Is it your testimony that you disagree with that statement? Yes or no, please.

A Would you re-read the question, please, is it disagreed or disagree?

Q Disagree.

A In part. I would have written it "much of the material summarized".

Q I would like to leave that --

A But the most significant --

Q Excuse me, please, Mr. Navasky. How you would have written it, I will leave to Mr. Abrams on redirect, who is eminently capable of bringing

that testimony out. I like to offer in evidence all three of these articles, two from yesterday and 51 from this morning.

MR. ABRAMS: Your Honor, I have no objection to the admission into evidence of Plaintiffs' Exhibit 49 and Plaintiffs' Exhibit 50, The New York Times and Washington Post articles referred to yesterday.

THE COURT: Those will be received.

MR. ABRAMS: I do object to the admissibility [526] of the document today. It seems to me to have no probative value at all that Mr. Mitgang of The New York Times was of the opinion that much of the material had been published before, unless Mr. Mitgang is to be called here as some kind of expert.

The witness has been asked one question about the article, he has responded to it. There is nothing else in the article which is admissible. What Mr. Knowlton of Harper and Row had to say is not only prejudicial, but clearly inadmissible.

The article is heresay and it is prejudicial and it is irrelevant.

MR. ZISSU: Your Honor, I would restrict it to the portion that the witness read out loud. I think it is evidence of the perception of the press as to what was new in The Nation's article. It was published contemporaneously by a leading newspaper and a leading reporter.

MR. ABRAMS: Your Honor, if that is the basis of the proffer, I will

withdraw my objection as to that sentence.

THE COURT: All right. It will be received to that extent.

(Plaintiffs' Exhibits 49, 50 and 51 were received in evidence.) [527]

Q Mr. Navasky, is it correct to say that the purpose of then President Ford's historic appeal before the House Committee was to deal with the pardon issue and the concerns in the country about impropriety?

A I can't --

Q You disagree with that?

A No. I mean, what was his real purpose. Those were obviously some of his purposes.

Q So your testimony is you don't know, or you dispute that?

A No, I say I can't know what his ultimate purpose was, but those seem reasonable purposes.

Q Yesterday, Mr. Navasky, I think you mentioned that even the Reader's Digest had picked up upon your article and the conspiracy or deal theory on the pardon --

A No, I don't think I said that.

Q What did you say?

A I thought I said that they used very close to the front of their article the material related to the Ford-Haig conversations, just as I used material related to the Ford-Haig conversations very close to the front of my article. I didn't mean to suggest that they took from or read or knew about The Nation article when they decided what

they were going to publish. [528]

Q We are talking about the Reader's Digest article that has been referred to as a serialization or second serialization that was authorized by the plaintiff.

A That's right.

Q Is it fair to say that your April 7, 1979 article mentions that the Ford Memoirs contain new detail but does not thereafter spell out or label detail by detail what the new details were? Is that a fair statement?

A Not entirely. It seems to me what is fair in it is that I do not label, this is new, that is new, the other is new, but that what is in my article contains a lot of new detail for a 2,500 word article. Certainly not

anywhere near what is in the 600 page book or however many pages the Ford book is. I want to correct that not exact number of pages. It's not 600. In manuscript form it was 600.

THE COURT: Four hundred and something.

Q Am I correct that you testified also in your deposition that The Nation magazine would not have taken such a club-the-reader-over-the-head approach to such a topic as alleged impropriety at the highest levels of government and that in the 116 years of its publishing history The Nation doesn't write that way?

MR. ABRAMS: Can I have the page reference, [529] please, Mr. Zissu?

MR. ZISSU: I will, if he has any doubt about it.

THE WITNESS: I'd like to see the testimony. You are putting a cast on it a little differently than the way I said it, I think.

Q At page 89 of your deposition at line 15: The question is, were you asked these questions and did you give these answers:

"Q Is it fair to say that the article does not attempt to go through the facts and say what is new and what isn't new other than to suggest it by organization?
"A I think it implicitly tells the reader then explicitly tells the reader there are new details. It does not label detail by detail. We wouldn't do that and we haven't done it in the 116 years of publishing."

Was that your testimony?

A If you say that is what I said, yes.

Q Are you familiar with all the articles that The Nation has published in its 116 years of history?

A The spirit in which I gave that statement--

Q No, are you familiar? [530]

A I am more familiar than most people, but I could not recite article by article, word for word. But I did before I came to The Nation attempt to read through the magazine, starting in 1865, believe it or not. I did not read every article word for word, but I looked at every volume in the library at Princeton.

Q You do keep old issues?

A Yes, we have a complete set -- well, there are one or two volumes missing, but we have a set.

Q Are you familiar with the articles over the last ten years?

A I am roughly familiar with

them. Again, not article by article, and you undoubtedly could find one that is chronologically organized, but it wouldn't change the basic thrust of my statement.

Q What about articles from November of 1974, are you familiar with any of those?

A You'd have to --

Q I am going to show you an article.

A I'm sure you have got one.

MR. ZISSU: And I am going to mark as Plaintiffs' Exhibit 52 for identification an article which appeared in the November 9, 1974 issue of The Nation, entitled, "Some Gaps In Ford's Candor." It has [531] a preheading "The Notorious Pardon," by Bill Nigut -- is that correctly pronounced?

A I don't know. I wasn't there in 1974. I don't know how to pronounce it.

Q Have you ever seen that article before?

A I don't remember reading this article in particular, but I might have.

(Plaintiffs' Exhibit 52 marked for identification.)

A I subscribed to the magazine at that period.

Q You want to read it for a second?

A Well --

Q Let me see, you may not have to.

A I would like to read it all the way through very carefully if you are going to ask me probing questions about it.

Q If I do, I will give you a chance.

A Okay. [532]

Q In any event, Mr. Navasky, on the subject of the known record and prior press coverage of the pardon, did you look into the possibility that The Nation itself, your own magazine, had covered these very matters in 1974?

A The Nation, alas, when I arrived there, did not have an index to its back issues, and we did not have a morgue that covered them. So we did not look into that in that way. It is my memory, however, that during that period we did subscribe to The New York Times data bank, which had forty different periodicals on it and that what we may have done was, we may have conducted a

search through the data bank to see what there was there.

Q Are you testifying that before you wrote and published the April 7, 1979 article in The Nation, you conducted a search?

A No, I'm not. I am saying that is what we might have done.

Q That is what you might have done.

A Yes. I'm not saying we did that.

Q Did you do it?

A Pardon me?

Q Did you do it?

A I said I'm not saying we did that.

Q But I want to know whether you are saying [533] you did do it, yes or no, did you do it or didn't you do it?

A It is not my testimony that we did that, because I don't have a specific memory that we did that.

Q In other words, you did not do it?

A Well, I don't want to make --

Q If you will not refer to your answer as to whether it is your testimony, just answer it yes or no.

A It is not my memory that we did that. But I will leave the door open. We might have done it.

Q Did you know about this article when you wrote the April 7, 1979 Nation article?

A Not specifically. But it wouldn't have made --

Q Whether it would have made a difference, I will leave that to Mr. Abrams, again.

A Okay.

Q Now we are going to again go back to your deposition testimony, Mr. Navasky, at page 121 and ask you again were you asked these questions and did you give these answers:

MR. ZISSU: At this time I would like to offer into evidence The Nation article, Plaintiffs' Exhibit 52, in evidence. I'd like to offer that in evidence.

MR. ABRAMS: I haven't finished reading it, [534] your Honor, and I don't know for what purpose it is being offered.

THE COURT: 52 is what?

MR. ABRAMS: The Nation article.

MR. ZISSU: That is evidence not only of the known record of what was

covered in the press, but was covered by the witness' own magazine.

MR. ABRAMS: Could I have a minute to look through it, your Honor?

THE COURT: Yes.

(Pause.)

MR. ABRAMS: Your Honor, without conceding the relevance of the document, I have no objection.

THE COURT: Received.

(Plaintiffs' Exhibit 52 was received in evidence.)

Q I believe you may have inadvertently made some notations on the documents.

A Advertently.

Q You may not have realized that was the original for the Court.

A Right.

Q Did you say before that you were a subscriber to the Nation in this period? [535]

A Yes.

Q Turning to page 121 of your deposition, I am going to ask you whether you were asked this question and gave this answer, starting at line 17:

"Q Is it fair to say that the article consists of either quotations or paraphrasing only from the manuscript?
"A The article, in my judgment, is three things: number one, it is a news story in the classic mode about a news event, the news event being the publication of the book of a former president; number two, and more importantly from our perspective, it is by our organization of materials and by my selecting out and isolating elements of the process by which the pardon came about, the revelation of a possible obstruction of justice at the highest levels of the polity and as such is of major significance, not only newsworthy significance at the time, but also historical significance; number three, it is a newsmaking article. The fact of number one and two, makes us think that it is newsworthy in and of

itself, and that is why we rushed into print."

I want to direct your attention to the first, number one, "It is a news story in the classic mode about a news event, and the news event being the publication [536] of the book of a former president."

With regard to that statement that your article was in the classic mode about a news event, the news event being the publication of a book, it's a fact that when you wrote this article and published it that there was no publication of Mr. Ford's book, isn't that true?

A Perhaps I should have said anticipated publication of a book.

Q Or an unpublished manuscript would be more accurate?

A The news event was that this is what Ford was saying in his book.

Q Is it your experience that it is in the classic mode to write news stories about unpublished manuscripts?

A It would not have been a news event if I wrote this story a week after the book was published because it would be those facts and that news would have been generally covered in the daily papers thereafter and, moreover, it would have been covered in a way that didn't highlight what I thought was the policy news.

Q What was so important about getting that news out a matter of weeks before it was coming out anyway in the book?

A There are a number of things

that went through [537] our mind. First of all --

Q Let me --

MR. ABRAMS: Judge --

THE COURT: Let him answer, Mr. Zissu.

MR. ABRAMS: It's an open ended question.

Q I was going to say your mind at the time.

A My mind at the time as I best remember it at this time. First of all, we publish a weekly magazine, and we want to be the ones to get out the news. So that it is in our magazine's interest and tradition to try to break stories. We want to do so within limits of propriety, within the limits of our own -- the interests of our editorial interests

and, of course, within the limits of the law. Secondly, in this particular case what was important to us was that we wanted to get out not just the news facts of the case, but we wanted to get them out in a way that put them in the context of our opinion that there was a possible obstruction of justice, which was the reverse of the news stories that were written some years earlier, where the headline was there was no obstruction of justice, there was no deal.

It was our judgment that this material provided [538] new evidence that there was a possible obstruction of justice. Then there were other news items, such as the story about the photographer, the business about Nixon's comments on Connally, and the Rockefeller

withdrawal, which seemed to me appropriate -- it wasn't necessary that we get them out two weeks ahead of time, or what really was four weeks or six weeks, because we didn't know what Time was going to publish, but it was appropriate for us to put them in a news story.

Q I think this is in line with your deposition testimony that once the Ford book were published there would be no news value in isolating the story of a possible impropriety. Is it not true that any particularly persuasive analysis or insight in this question would be of the same general interest to intelligent readers of your kind at any point, even after 1974? Isn't that true?

MR. ABRAMS: I object to the form of the question. The reference to the deposition seems to me --

THE COURT: I will permit it. Overruled.

A It is true that a persuasive analysis might persuade intelligent readers regardless of when it appeared. However, the ability of one to get one's analysis to the attention of the largest possible audience in our judgment, in my judgment, was dramatically affected by the opportunity [539] we had to publish in advance of publication of the Ford book. And it was my judgment at that time that we had the opportunity to make some news by doing so, and that that news would possibly get one of the wire services to pick it up, which happens maybe six times a year to a Nation story, and that that wire service story would bring that news to the attention

of an audience of millions, whereas The Nation Magazine reaches an audience of 40-odd thousand, or at that time less than that.

Q I think yesterday on this subject you testified something to the effect that after the book came out there would be no chance of making news and that the public could not read Ford's book through the -- the public would not then be able to read Ford's book through the screen of questions that The Nation raised in your article?

A Correct. [540]

Q Is it your testimony that fair comment of this kind means putting your screen in front of the public before the author has had his chance to tell his own story in his own book?

A It is our testimony that what you call fair comment, I don't know if you are using that as a term of art or just --

Q I am not using it as a term of art.

A Yes, that if a former president who writes a book that contains news which he had access to as the result of his public office, it is fair for The Nation Magazine or any other magazine that gets access to that news to publish it if they are technologically able to do so the day after they get that news. It is not fair for them to take his literary effort, but it is fair for them to publish that news.

Q You think that the public would see these questions in your

article by what you call your configura-tion or inverted pyramid style?

A I hoped that our article raised questions about the propriety of the conversations that were held before and after between -- before and after Ford had talked with his aides between Ford and Haig, and that those questions would be a form of instruction or added [541] data for editorial writers around the country who might be exposed to our story and for citizens around the country and more particularly for our own readers. That was our hope, my hope.

Q Mr. Navasky, I want to show you Defendants' Exhibit A in evidence, which is photocopies of material from the plaintiff Harper & Row's publicity

kit for the book "A Time to Heal". When did you first see that or a copy of that material?

A To my best memory, I didn't see it until quite late in this lawsuit.

Q So you never saw that before you published your article?

A I did not see it at the time I published the article, no. I am glad to see it says it is a lot of news.

MR. ZISSU: I would ask that be stricken, your Honor.

THE COURT: Strike that out.

THE WITNESS: Sorry.

Q I think yesterday, Mr. Navasky, I read to you from some deposition testimony in which you stated that you would have written your story from the documents if you had known that they

were available, and I referred [542] to pages, I think at pages 55 and 56 of the deposition. My question now is the following: It is not true, is it, that your purpose in writing the article was to present Mr. Ford's personal and subjective feelings as expressed in his manuscript?

A That wasn't my ultimate purpose, no. Occasionally a feeling has policy relevance and the language in which he expresses it is inextricably bound up with the fact that I would have to describe to make my news policy point, so --

Q And you were not interested in former President Ford's style, were you?

A We were not interested --

Q His literary style?

A -- in appropriating his literary style, no.

Q And if, as you have testified, your purpose was simply to report the fact that Ford reported these events, then you also did not have as your purpose to comment on the facts or make any independent construction of your own, did you?

A That's wrong, the way I see it, anyway.

Q Is it fair to say that you were only getting out the news value of the book first and had no intention of making any independent commentary or construction, [543] is that a fair statement?

A I don't think so, no.

Q In reporting what Mr. Ford

reported and in claiming that this is only writing about his book as news, are you also saying that it was therefore necessary for you to quote and paraphrase him?

MR. ABRAMS: I object to the form of the question.

MR. ZISSU: Let me finish the question.

Q -- to the extent of 85 percent of your own article?

MR. ABRAMS: I object to the form of the question. The witness has not testified that his only purpose was --

MR. ZISSU: I didn't say his only purpose, but I will go to the deposition. It was one of his purposes.

MR. ABRAMS: If you state a purpose, you can answer.

Q In reporting -- I will rephrase the question. In reporting what Mr. Ford reported and in claiming that this was, in part, only writing about his book as news, are you also saying that it was therefore necessary for you to quote and paraphrase him to the extent of approximately 85 percent of your article? [544]

A I don't accept your quantification.

Q What is your quantification?

A I have to look at our brief to refresh my recollection, but my impression was that we had quoted under 500 words and that -- and of those a lot of them were arguably not his to copyright.

Q What about paraphrasing?

A And that while when one writes -- whenever one writes about a book in a conventional essay or book review, one use of the term is paraphrase, and in that sense one could say that everything one writes about a book is a paraphrase. However, in reading my article sentence by sentence one would see that some of it is paraphrase and other of it is synthesis and other of it is judgment and other is description. So one would have to go through it carefully and see which came -- which is close to the Ford book, which part of the Ford book, et cetera. But I didn't pretend that this was anything other than a description of those news aspects of the Ford book that I regarded as adding up to a possible obstruction of justice, plus that other

news which was appropriate to put into such an article.

Q Even taking our figures of 85 percent or [545] the figures you mentioned, isn't it usual to paraphrase far less than that in an article of this type?

MR. ABRAMS: I object to the form of the question.

THE COURT: No, I will permit it.

A I read last Sunday's front page New York Times book review --

Q I would ask that you not discuss other articles --

THE COURT: I will let him answer it that way.

A Last Sunday's front page New York Times book review essay on the Ehrlichman book seemed to me to contain

more quotes per inch, more news per inch, as much paraphrases or more than The Nation article, and it was a very good essay and --

Q I ask you again --

A And it dealt with the same subject.

Q I have a couple of questions for you about that. My first question, is it usual to paraphrase this much in your kind of article, not a book review?

A It is not usual for The Nation to get a hot news story. We get only about six of those a year. But when we get one, we, within the bounds of what's legally possible, will do something that's unusual for us. [546]

Q You don't want to answer the question?

MR. ABRAMS: I object to the form of the question.

A I am trying to answer your question.

Q Will you tell me whether it is usual to paraphrase and quote this much in the kind of article you have described that you wrote on April 7, 1979?

MR. ABRAMS: Asked and answered. Objection.

MR. ZISSU: It has not been answered.

THE COURT: Let me hear it again.

(Question read.)

THE COURT: Overruled.

A Can I ask you, is it usual for who, for me or the writers at large?

Q Well, let's say writers at large.

A I would say, as I said yesterday, there are two different models for the kind of article that could have been written out of this book that occurred to me at the time. Both of them would be conventional models. One would be a kind of editorialized mobilization of information and the other would be the kind of mobilization presented as a factual matter, but with a real policy implication. And to do that requires some paraphrase.

A Is it usual to quote this much? [547]

A Yes, my --

Q I want to focus on the sum. Is it usual to take this much?

A My sense was that I took the appropriate amount for the subject that

I had and to that extent, what is usual -- you have to look at things case by case. What is usual is to take the appropriate amount and what I took was the appropriate amount. In that sense, I would say yes, it is. [548]

Q You are not testifying that your article was a book review, are you?

A No.

Q Isn't it a fact that book reviews come out either in conjunction with or after publication?

A It is a fact that most book reviews do. Many book reviewers feel free to publish as soon --

Q I don't want to hear what most book reviewers --

MR. ABRAMS: I object to that, your Honor. The witness was in the middle of answering.

THE COURT: I do wish the witness would listen to the question that's asked him and answer that question, so I will strike out this answer. Let's have the question read back, please.

(Question read.)

THE COURT: You may answer. I want you to answer that question first and then we will get another question and then we will go on, all right.

THE WITNESS: Yes, your Honor.

Q Now, I will ask you, Mr. Navasky, if you were asked this question and gave this answer at page 68 of your deposition, starting at line 11.

"Q Are you saying that in order to accurately report on the book from the news perspective [549] you inevitably adhere closely to the language of the author of this kind of work.
"A I am saying it is a convention of writing about books to paraphrase occasionally."

Did you give that testimony?

A If you say so, yes.

Q I do.

A Yes.

THE COURT: It is here. (Indicating.)

THE WITNESS: Yes.

Q Do I understand your testimony yesterday and today is that without your article, other columnists, newspapers and reporters would not have focused on the possibility of the impropriety?

A No.

Q Is it fair to say that you regarded your publication of the April 7, 1979 article as part of the competition among competing publications, namely, The Nation and Time Magazine?

A I don't think it is fair to

say that, no. Your Honor, I am really not sure whether I am supposed to say any more or not.

Q That's fine. I will show you Plaintiffs' [550] exhibit 18 in evidence, which is appendix A. This is, I think, either typed notes or a typed version of your draft of The Nation article, and I will direct your attention to the second to last page that has a paper clip on it.

A Right.

Q These are your words that are typed here, is that correct?

A I believe they are, yes.

Q And I am asking you to look at that whole page really, the lower half, it is only a small typed portion. Wasn't the basic reason that you decided

to publish this article, as you did, your personal view that it is the public's right to own these works or the profits therefrom without regard to what was allegedly new, old or anything else?

A Was it my purpose, did you say?

Q Yes.

A No.

Q Let me read to you, this is on the second to last page your own words. "It is not merely a matter of law, fair comment, nor a matter of healthy competition among competing papers, although those are part of it." [551] That's the first thing I would ask you to direct your attention to. Isn't it your position and wasn't it your position at the time that your publication of The

Nation article was, part of it was that it was the healthy competition among competing papers?

A That that was the purpose of it?

Q No, that your decision to publish, that part of that decision and part of the purpose of it was that this was a matter of healthy competition among competing papers?

A Well, I didn't think of it in those terms.

Q You wrote these words?

A But I didn't publish these words. This is an early draft that contains a lot of things in it that --

THE COURT: I think then the question to you, Mr. Navasky, is do you stand behind the underlying principles

of those words, even if they were in an early draft?

THE WITNESS: I believe competition among magazines is healthy and that part of our reason for publishing was that we wanted to win the fair competition among -- to get out the news as soon as possible. [552]

Q Now, let me direct your attention to the next sentence where you stated:

> "It is also as W.A. Schnapper has suggested in these pages and elsewhere, a matter of the public's right to own these works or the profits therefrom."

My question is, is that your position, that these works, meaning the manuscript of the former President, that the public has a right to own those works and the profits therefrom, is that your position?

A As a matter of social policy, I believe that the law -- I believe that the public has a right to get access to news at the same time that former public officials do. I also believe that former public officials have the right to write and copyright their works and make a profit from it.

Q Was that view a motivating factor in your decision --

A It wasn't --

Q -- in your decision to publish this article?

A It wasn't a main motivating factor in our decision to publish this article.

Q Is it still your position that President Ford expropriated the news from the public in writing his memoirs?

[553]A Where do you -- where do I say that?

Q Let me go to page 109 of your deposition.

A Right.

Q Starting at line 9.

"Q In Plaintiff's Exhibit 14 for identification there is with reference to news that Gerald Ford expropriated from the public. What news did you mean that President Ford expropriated from the public?
"A For example, the Henry Ruth memorandum.
"Q What other examples are there?
"A Well, again, it is his reading the document which he read with reference to the Haig conversation.
"Q Are there any others that you would say he expropriated from the public?
"A Again, it is our configuration of these tidbits and passages, all of which were based on public documents. That is what I was referring to there."

A Could you tell me what is Exhibit 14? Is that our editorial?

Q It is probably the editorial

from Cornering History dated May 5, 1979. I believe it is in evidence. [554] It could be the other one, Profits -- it is the other one, Profits of History, which is Plaintiffs' Exhibit 21 in evidence and I will hand it to you. An editorial.

THE WITNESS: Your Honor, can I make a -- I have listened carefully to the question but I think it is important to make a distinction between my motive for publishing the article and what I wrote in an editorial after the article was published. I would like to speak to that question as part of the answer to this question.

THE COURT: Okay.

A After we published the article and were threatened with a lawsuit by

Harper and Row, I got intensely interested in the public policy question of who owns the news as it were, and I went and did -- we began some research on that matter and in connection with that research I came to believe in a strong fashion that as a matter of social policy the current situation with regard to the President's papers is a confused one and that it ought to be clarified and it ought to be clarified to the public's benefit. So that's my belief and that is the principle behind which I would stand today.

As to the specific items you read me I would now make distinctions among them and I do believe [555] that Ford reading the Haig memorandum is a piece of news that was not available to the

general public at the time of the Hungate Hearings. There were a whole set of circumstances surrounding that ritual that were not available to the general public at the time of the Hungate hearings and only became available to me when I saw that manuscript, when they read the book or read The Nation article.

As far as the original memorandum, I think it was not part of the news consciousness of the general public, although it had been quoted, buried in the Jaworski book in the middle of something else, and I have no knowledge whether Ford asked copyright permission for that or whether that was something that was generally available beyond that buried place in the Jaworski book. [556]

Q But you were not intensely interested in these matters before you published your article?

A They were not my primary motive. The primary motive was that the article in our judgment was newsworthy and policy significant. I would give that a question of the public papers, at that point, a low percentage if you want to quantify motive.

Q Is it fair to say that you weren't intensely interested and didn't pursue these matters before you published the article because you were in a rush to get it out?

A Yes, it is fair to say that I tried to and did write that story over a weekend within, as I remember it, to my best recollection, within a 24-hour

period, and I felt that since it had been leaked to us, it could have been leaked to lots of other people and that it was our opportunity to get it out and to get it out in the way that we thought would be socially useful.

* * *

[583]

BY MR. ABRAMS:

Q Mr. Navasky, yesterday you were asked questions about and testified about the passage on page 87 of your deposition in which you set forth three matters which struck you as specially new detail in the Ford memoirs was as you read them. The third set forth on page 87, at page 6, you stated as follows:

> "Number 3 would be the fact that he hadn't told Haig he thought it would be improper to offer to pardon Nixon in exchange for Nixon's resignation at the time they had that original discussion."

What was it that struck you newsworthy about that?

A Well, it seemed to me that what was newsworthy about that was that the potential, once again, president of the United States was insensitive to the possibility of an impropriety and an ethical question that raised the possibility of appearance of an obstruction of justice and had to be instructed on that appearance by three aides who called it a time bomb, who told him silence implies assent and who said it could only cause trouble.

Q As of April 1979, Mr. Navasky, did you know that President Ford's testimony in the Hungate [584] Hearings had

related his failure to respond immediately to Mr. Haig that it would be improper to issue a pardon in exchange for a resignation?

A No, I did not.

Q And as of April 1979, did you know whether or not President Ford had only called General Haig after his aides had advised him to do so and warned him of possible consequences if he did not?

MR. ZISSU: I object to Mr. Abrams' testifying. He is leading the witness.

THE COURT: It is a little heavy handed. Do you want to rephrase it.

Q What did you know in April 1979 as to any consultations President Ford may have had with his aides prior to calling General Haig?

A I knew specifically what I

read in the Ford book and until that point I had not been aware that he had been -- that a possible trigger for those calls was the conversations that he had with his aides. Let me say further that what struck me at the time, it was not just that they told him it would look improper, what it could have been was that since they now knew --

THE COURT: Wait a minute. Wait a minute. [585] You answered a question about one or two back similarly. Only one aide said it would look improper. You read this article and you have indicated that three aides indicated. Only one aide indicated it would look improper. Two aides said that the mention of a pardon caused a problem, public mention of a problem, but only one aide,

as I understand it, said that he might have created a misimpression by not responding, and this is the second time you said that and I just want to be perfectly clear that you focused on your own article.

THE WITNESS: Your Honor, it was my reading of the Ford memoir that Jack Marsh felt that the mention of a pardon in this context, in this context was a time bomb, and I do take that to seem that as --

THE COURT: He did not say that silence implies assent.

THE WITNESS: No, each of them had their different way of saying it. It seemed to me they were all making the central point. That was my perspective. I may be wrong but that's my view.

THE COURT: Let's go forward on that basis.

Q Do you know, Mr. Navasky, whether President Ford at any point prior to the drafting and preparation of his memoir had disclosed that the document -- that what he had said to General Haig was -- came from a written document which he read slowly on the phone to General Haig?

MR. ZISSU: I object. That's a leading question. Mr. Abrams is testifying. The witness has testified on direct and on cross that he didn't know anything about these things.

MR. ABRAMS: I am asking him now. The current question, in light of the questioning yesterday about what was in the Hungate hearings and what not, is

Mr. Navasky's information as of now whether it had ever before been disclosed that what President Ford did was to read a written statement on the phone to General Haig.

MR. ZISSU: I object, relevance.

THE COURT: Let me ask you, I will let you get an answer to that but then there is a necessary follow-up question which has got to be put. You can get your answer and then we will go to the next one.

Q Mr. Navasky.

A I now believe to the best of my knowledge that the first time it has come out that President Ford called General Haig back and read his -- and wrote out [587] a statement in advance, read it over the phone, read it slowly, read

it in the presence of witnesses, was in his book.

Q And what with respect to that did you publish in your article?

A Well, in our article we published that -- we published the statement itself and if I may look at it directly so there is no misunderstanding about it. Ford called Haig and read him a written statement, which was a fact that -- this was the first time to our knowledge, to my knowledge now, this is the first time this was ever on the public record. At the time we published the article I wasn't aware of that. I thought the statement itself was newsworthy. Now I discover that the fact that it was written is what is new about it. The fact that it was read slowly,

the fact it was done in the presence of aides.

THE COURT: What is it about the fact the statement was written that makes it newsworthy?

THE WITNESS: Well --

THE COURT: Because the statement itself is in the Hungate testimony.

MR. ABRAMS: We will be arguing --

THE COURT: I understand. [588]

MR. ABRAMS: May I respond?

THE COURT: I think the witness should respond because he is the one who made the determination.

THE WITNESS: Looking at it now, your Honor, and having read the articles that Mr. Zissu gave me yesterday, what makes it newsworthy to me is that the way it was presented in the Hungate

hearings and the way it was treated in most news stories at the time was as a casual conversation that had no bearing on any propriety or impropriety. When one writes a statement down carefully, when one reads it, when one makes sure there are witnesses present, one is making a record and frequently the motive for making a record is that one feels one is in trouble. So to me, that really now, looking at it again, says, this is major news and new as well as being newsworthy.

MR. ZISSU: Your Honor, all of this testimony is just the witness arguing today --

THE COURT: I am treating it as argument.

MR. ABRAMS: He had been asked a

number of questions yesterday about his view now.

Q Let's go on, Mr. Navasky. Do you have more, Judge Owen, on this subject?

THE COURT: I do have more. That is, [589] I take it that your deposition answer at page 87 where you said that the fact of the statement was the new detail, you now say it is the fact that the statement was written and not the statement itself? You want to change your deposition emphasis to that extent, is that correct?

MR. ABRAMS: Are you asking as of April '79?

THE COURT: As of right this minute.

THE WITNESS: Your Honor, having

read all the materials last night I do want to say that that is what I now consider to be new about it. What I still would say now is that it was newsworthy then because it was not in the public consciousness and in the context of the politics of 1979 and a possible presidential campaign. It leaped out at me that way partly. Maybe I can say in retrospect because it was written. [590]

Q Mr. Navasky, could you now direct your attention, please, to the Plaintiffs' Exhibit 49, which is The New York Times article of October 18, 1974, which was admitted into evidence today, and to which Mr. Zissu made a reference yesterday with respect to all the columns contained in it. Have you now read Plaintiffs' Exhibit 49?

A Yes, I have.

Q I want to direct your attention now separately to each of the portions of it to which Mr. Zissu directed your attention yesterday. Directing your attention first to the page 1 article by David Rosenbaum, is there any reference in there to anything about the Ruth memo which is set forth in the Jaworski book?

A No, there is not.

Q Is there anything in there about the statement that President Ford read on the phone to General Haig?

A Yes, there is.

Q Where is that, Mr. Navasky?

A That is after the jump, and it is the second column over from the left, about a quarter of the way down. Mr.

Ford said he told Mr. Haig he needed "time to think" and the next day, he testified, to talk to St. Clair. He said he called Mr. Haig and he told [591] them that -- and there is the statement.

Q Is there anything --

A There is a paraphrase of the statement, actually.

Q Is there anything in the Rosenbaum column with respect to whether it was written or oral?

A There is nothing in the Rosenbaum column about whether it was written or oral.

Q Is there anything in the Rosenbaum column about whether President Ford had met with any aides previously?

A Other than a talk with James

St. Clair on a different matter, there is nothing in the Rosenbaum column about conversations with any of his aides.

Q Directing your attention now, Mr. Navasky, to the column which Mr. Zissu directed your attention to yesterday, written by James M. Naughton on the jump page -- what do you mean by jump page?

A Well, I mean the page after the page on which the story originally appears. So where it is continued.

Q Referring to the column by Mr. Naughton entitled "History played out on familiar stage" is there anything there about the Ruth memo?

A No, there is not.

Q Or about President Ford's statement to [592] Mr. Haig?

A No, there is not.

Q Or about Mr. Haig's conversation with President Ford?

A No, there is not.

Q I direct your attention now to the column which Mr. Zissu directed you to yesterday, by John Herbers. Is there anything in that column about any of those issues, the Ruth memorandum, President Ford's statement to General Haig, and General Haig's earlier statement to President Ford with respect to the pardon?

A No, there is not.

Q Directing your attention now to the article which Mr. Zissu referred to by Philip Shabecoff entitled "Testimony Contradicts Accounts on Haig," is there anything in that article with

respect to the Ruth memorandum or President Ford's statement to General Haig by telephone, or President Ford's initial conversation with General Haig about the issue of a pardon in return for resignation?

A No, there is not.

Q Directing your attention now to the editorial on the next page which Mr. Zissu directed your attention to, entitled, "The President Testifies," is there any reference there to any of those three topics? [593]

A No, there is not.

Q And directing your attention to Mr. Reston's column on the next page, which Mr. Zissu directed your attention to entitled "Don't Sell Ford Short" is there any reference in that column?

A No, there is not.

Q Could you now direct your attention to the Washington Post article which has been introduced in evidence as Plaintiffs' Exhibit 50, have you read that article?

A Yes, I have.

Q Is there anything in there with respect to the Ruth memorandum enclosed and set forth in Mr. Jaworski's book?

A No, there is not.

Q Is there any reference to the statement that President Ford read on the phone to General Haig?

A No, there is not.

Q Is there any reference at all to President Ford's speaking to General Haig?

A Yes, there is.

Q Can you identify that, please?

A Yes, on page 1 there is a reference to the previous conversation that one of the options was -- [594]

Q Why don't you read it into the record, Mr. Navasky, so I can just end this line of inquiry?

> A "Mr Ford testified that Haig told him White House staff members were considering half a dozen options with Mr. Nixon might follow and that one of them was that he might resign and be pardoned."

Q Is there any reference in the Washington Post article introduced in evidence to the fact that one of the things President Ford told Mr. Haig was that he should not draw any conclusions from his silence in the conversation they had had the day before?

A No, there is not. Let me

say, I could read another paragraph that refers to -- the paragraph after the one I just read goes into more detail about the Ford conversation with Haig in advance, that's all. But it doesn't relate to the questions you asked me.

Q Mr. Navasky, as you sit here today, is it your position that there is new material in The Nation article not previously disclosed before?

MR. ZISSU: I am going to object. The question is what is new in the Ford manuscript, not what's new in The Nation article.

MR. ABRAMS: That may be Mr. Zissu's question, but certainly one of the issues we will be briefing to [595] you, your Honor, in terms of both a fair use defense and first amendment

defenses, is what contribution The Nation article made.

THE COURT: Are you going to have him specify what is new?

MR. ABRAMS: Yes, sir. I am going to ask him as to specific passages, whether they are new or not.

THE COURT: All right, I will let you do it.

Q Would you put the article before you, Mr. Navasky?

A Yes. To answer your question, yes, it is my position that there is new material.

MR. ZISSU: Excuse me, your Honor. You mean new in the sense that it wasn't previously in the Ford manuscript?

MR. ABRAMS: I mean new in the sense of not previously being disclosed to the American public.

MR. ZISSU: But --

MR. ABRAMS: That is the sense in which I asked the question.

MR. ZISSU: Do you include that in the Ford manuscript, in that the manuscript was unpublished? [596] Everything is new before the manuscript is published.

MR. ABRAMS: Not everything is new in the manuscript, but there were some things that were.

Q Was the information set forth on page one of your article that but for a misunderstanding President Ford might have selected Ronald Reagan as his 1976 running mate, to your knowledge, today new information as of the time you published it in The Nation?

A Yes. [597]

Q Was the information that Washington lawyer Edward Bennett Williams was President Ford's choice for the head of CIA new information as of the time you published it?

A Yes.

Q Was the information that President Nixon was the one who first proposed Nelson Rockefeller for Vice President and that President Ford regretted his "cowardice" in allowing Rockefeller to remove himself from vice presidential contention new information as of the time it was published in The Nation?

A Yes.

Q I direct your attention now to page 2 of your article. In the first full paragraph now, is the information that "Although Ford said it would be

improper for him to make any recommendation," new information not previously disclosed?

A I am --

Q I'm sorry, that is the second paragraph. It's the first full paragraph, it starts with the words "although."

A See, I have the copy that says page 363, and I can't see --

Q Page 363, left column, the first heading is "Nixon." [598]

A Yes.

Q And then go down about twelve lines, with a line that starts in the middle of the word --

A I see.

Q My question is, the information that "Although Ford said it would

be improper for him to make any recommendation," in your view is that new information?

A Yes.

Q Going down further, is the information in the paragraph which begins "But because Ford had neglected to tell Haig," new information?

A Yes.

Q Going down further, is the information starting in the bottom paragraph, left column, with the words "Ford also discussed the matter with Jack Marsh" new information?

A Yes.

Q Turning to the right column, with respect to President Ford's conversation with General Haig, do you believe that the fact that President Ford read a written statement was new information?

A Yes.

Q Turning now to the bottom part of page 363, do you believe that all the information, starting with the words "Buchen, Haig, and Henry Kissinger agreed with [599] him" through the bottom of the page, is new information?

A Yes.

Q On the next page, do you believe that the entire page contains new information?

A Yes, with the exception of the item on the decision to run again.

Q What about that do you believe was not new information?

A Well, I think Ford had talked about that before, but I felt it was newsworthy because he was -- it contradicted his circumstances in '79 -- his potential candidacy in '79.

Q Do you believe the material under the heading "On Nixon's Character" was new information?

A Yes.

Q Mr. Navasky, does the fact that The Nation article contains material about the pardon which had been previously disclosed in the Hungate Committee hearings change your view as to the newsworthiness of the article as a whole?

A No, I think that things can be newsworthy even though they are not new.

Q Why it that?

A Because changed political contexts bring public [600] events to public attention anew, and when a former president of the United States puts them on the public agenda with his own --

based on his own experience, that serves them up in what I would regard as a newsworthy way. As I mentioned the other day, Walter Lippman said news is what public officials say it is. I thought this was a case in point.

Q Do you think that today?

A Yes, I do.

Q Mr. Zissu asked you some questions earlier with respect to the publication of an advertisement in the April 7, 1979 issue of The Nation. Have you now been shown the letter to which you referred in your testimony?

A Yes, I have.

Q I put before you, Mr. Navasky, Defendants' Exhibit QQ for identification and ask you whether that is the letter pursuant to which the agreement

was reached to publish a supplement in the April 7th issue of The Nation.

A Yes.

Q Did the fact that there was going to be a supplement in the April 7th issue have anything whatsoever to do with your decision to publish the article on the Ford memoirs? [601]

A Nothing whatsoever.

Q You mentioned yesterday that you had taken certain action at the time and since the time you have been the editor of The Nation. Did one of them relate to the cover of the Nation?

A. Yes.

Q What was that?

A We made one major format change, which was to change the cover of The Nation from a conventional display

cover to a cover that has typography on it, type, so that the stories start on the cover. We did that because we wanted the magazine to appear to be what it is, which is a serious journal of news and opinion.

MR. ABRAMS: I move the admission of Defendants' Exhibit QQ, your Honor.

MR. ZISSU: No objection.

(Defendants' Exhibit QQ was received in evidence.)

MR. ABRAMS: I have no further questions, your Honor.

RECROSS EXAMINATION

BY MR. ZISSU:

Q Mr. Navasky, is it your testimony today that the press generally did not cover in October of 1974 [602] President Ford's telephone call to General

Haig on August 2, 1974 in which President Ford said to Haig in effect that there would be no deal on the pardon?

A Some of the press covered it. None of them said it was a written statement made --

Q Please try to answer the question.

A I'm sorry.

Q The written statement -- we know about your argument. Everybody knows about it. Is it your testimony that the press generally did not cover in October 1974 the fact that President Ford made that telephone call?

A Some of the press did and some didn't.

Q Are you familiar with what the press did or didn't? Have you gone back

and looked at anything beside those two articles overnight?

A I have read all of the clippings that were in my attorney's office, in addition to these two articles. But I did not do an independent search of my own.

Q Some of the press did cover it?

A That's right.

Q Which of the press covered it?

A Well, The New York Times covered it on the jump in the way that I read. [603]

Q We follow your argument about the jump. I asked you which articles that you saw last night covered this.

A I saw none -- I saw The New York Times.

Q How many articles did you look at?

A Well, we had a big folder of -- I am now putting together the story about our -- which you don't want me to talk about, I am putting together the story about The Nation's story and what happened before, so I would say a half dozen, I don't know.

Q A half dozen what?

A Articles. But I would --

Q You looked at a half dozen?

A I would say so.

Q And on that basis you testify that some of the press did cover it and some did not?

A Primarily on the basis of your exhibits. I testified to that. [604]

Q So you are not able to say on

the basis of six articles, are you, that it was not covered?

A That "it" being the telephone discussion?

Q Right.

A That's right.

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[Portions of Plaintiffs' Exhibit 6]

[532]

AGREEMENT made this 28th day of February, 1977 by and between

PRESIDENT GERALD R. FORD

c/o The William Morris Agency, Inc., of 1350 Avenue of the Americas, New York, New York 10019 (hereinafter "Author") and HARPER & ROW PUBLISHERS, INC., of 10 East 53 Street, New York, New York 10022 (hereinafter "H&R") and THE READER'S DIGEST ASSOCIATION, INC., of New Castle, New York (hereinafter "RDA") (hereinafter collectively "Publisher") with respect to a presently Untitled Memoir by President Ford (hereinafter "the Work") the subject and nature of which is described in a letter dated February 22, 1977 addressed to The

William Morris Agency, Inc. by H&R, such letter being attached hereto as "Exhibit A".

WHEREAS, H&R and RDA have entered a co-publishing agreement under the terms of which H&R and RDA will co-publish the Work;

NOW, THEREFORE, in consideration of the promises set forth the parties hereto agree as follows:

1. PUBLISHER'S OBLIGATION: Publisher shall perform all of its obligations contained in this Agreement and conduct all of its transactions pursuant to this Agreement in a manner consistent with and with all due respect to the position of the Author as a world figure of international renown. Without limiting the generality of the foregoing,

Publisher shall publish its edition of the Work, conduct all of its advertising and promotion of its publication of the Work, and conduct the disposition of subsidiary rights granted to it hereunder in the manner described in the preceding sentence.

2. AUTHOR'S GRANT: Author grants to Publisher the sole and exclusive right to publish and sell the Work in book form in the English language and the sole and exclusive right to exercise, sell, license or otherwise dispose of any or all of the subsidiary rights thereto defined in Paragraph 10 hereof throughout the United States, its territories and [533] dependencies, the Philippine Islands and Canada, and the non-exclusive right to exercise the

rights granted by Author to Publisher hereunder throughout the rest of the world, with the exception of the British Commonwealth (excluding Canada) (hereinafter "the Territory") for the full term of copyright and any and all renewals and extensions thereof now or hereafter available in each country included in the Territory.

* * *

[551]

20. RESERVATION OF RIGHTS: All rights not specifically granted to Publisher herein are reserved by Author subject to the provisions of subparagraph 8(d) hereof and the provisions of this Paragraph.

(a) Without limiting the generality of the foregoing, Author

agrees that in making any disposition of motion picture rights, television rights or any other subsidiary rights to the Work, he will specifically reserve all publication rights to the Work with the exceptions of the right to publish but not to sell 7,500 words from the Work and the right to publish but not to sell excerpts, synopses, or summaries of the motion picture or television versions of the Work which do not exceed 7,500 words in length for advertising and promoting the motion picture or television versions of the Work provided that excerpts from the published version of the Work shall contain the appropriate copyright notice.

(b) Author acknowledges that the value of the rights granted to Publisher hereunder would be substantially diminished by Author's public discussion of the unique information not previously disclosed about Author's career and personal life which will be included in the Work, and Author agrees that Author will endeavor not to disseminate any such information in any media, including television, radio and newspaper and magazine interviews prior to the first publication of the Work hereunder. Spontaneous and brief statements by Author in response to reporters shall not be considered a breach of the foregoing provision.

* * *

[557]

EXHIBIT A February 22, 1977

5.

A. PRESIDENT FORD'S BOOK

The authors -- Gerald Ford and Trevor Armbrister -- propose a manuscript of approximately 150,000-175,000 words, the major portion of which will describe in close personal terms Mr. Ford's experiences when he became Vice-President, and then President, of the United States. Within the bounds of good taste and personal loyalties, this account will present significant hitherto unpublished material about

(1) Mr. Ford's relationship with former president Nixon, including Mr. Nixon's reactions to the crisis arising from the

Watergate break-in; (2) the circumstances and reasoning surrounding the pardon of Mr. Nixon by Mr. Ford; and (3) Mr. Ford's reflections on this period of history, and the morality and personalities involved.

While it is understood that Mr. Ford's pre-presidential years will be a part of this book, the finished product need not be an orthodox autobiography.

Mr. Armbrister will have access to all pertinent documents, where available; and in researching the book he will interview Mr. Ford's principal aides and other relevant sources for information concerning the Ford administration.

The final manuscript will present

as candid and honest an account as possible of the main period covered in order to preserve the record for history; but at the same time it is to be a warm, human document heavy with anecdoctal material.

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[Deposition of Gerald R. Ford]

[10]

Q Do you recall if you were told that Time offered to publish portions of your memoirs a week before the originally scheduled date for publication?

A No, sir.

Q Is this the first time, to your knowledge, that [11] that information has ever been given to you?

A I subsequently learned it some time thereafter, but significantly after the time sequence we are talking about.

Q Can you place at all in time how long after the events we are talking about that you learned that?

A Not --

Q Months afterward?

A Yes.

* * *

* * *

[15]

Q If I can ask you to look again at the agreement you reached with Harper & Row and Reader's Digest, and direct your attention, please, to paragraph 20 (B), which is on page 20, the language therein states, "Author acknowledges that the value of the rights granted to publisher hereunder would be substantially diminished by author's public discussion of the unique information not previously disclosed about author's career and personal life which would be included in the work, and author agrees that author will endeavor not to disseminate such information in any media, including television, radio and newspaper and magazine interviews prior to

[16] the first publication of the work hereunder."

There is an additional sentence which I am not reading into the record.

A May I read that?

Q Surely.

A The following sentence is, quote: "Spontaneous and brief statements by author in response to reporters shall not be considered a breach of the foregoing provision."

Q My question is, prior to publication of the book did any situations develop in which as a result of paragraph 20 (B) you were obliged to decline to be interviewed or to otherwise furnish information with respect to the pardon of President Nixon?

A After leaving the White House I was interviewed many times for radio, television and otherwise, and on many occasions when I would visit, for example, a college or university campus and would be asked questions by students and faculty, I would frequently be asked questions about the pardon.

My answer, repeatedly, was a repetition primarily of what I testified to before the Subcommittee of the House Committee on the Judiciary under Congressman Hungate. I stuck to the record, which was laid out very completely there, because I felt that was the public record, and that is what I [17] ought to use in responding to any questions from press or other.

Q Prior to publication were you

asked to appear on NBC television to discuss the pardon of President Nixon?

A They never asked me directly, to my best recollection. There was some discussion, which was primarily conducted through Dean Burch, as to whether I would appear, but there was a contractual, as I recall, agreement as to when I would disclose any additional information involving the pardon over and above what I testified to, such additional information being my subjective feelings, my personal discussions with my wife and others.

Q Was the agreement that you have just spoken about an agreement between you and NBC or an agreement between you, Harper & Row and Reader's Digest?

A I don't recall. I believe it was an agreement between myself and NBC, but I cannot tell you technically whether that is correct or not.

It was an agreement that I understood in one way or another.

Q Did you understand that you were precluded to any degree by your contract with Harper & Row and The Reader's Digest from disclosing, prior to publication of the book, any information with respect to the pardon of President Nixon [18] relating to your conversations with then General Haig?

A My agreement with Harper & Row was that I should relate on a broader basis my subjective feelings or any things different from what I had testified to before the House Committee on the Judiciary.

Q Is that what your book did?

A That is what my book did add over and above the testimony: the more intimate, the more personal, the more subjective personal feelings that went through my mind from the time that the pardon became a possibility from my point of view.

Q Apart from adding your intimate feelings, reactions and the like with respect to the pardon, did the book add anything with respect to your testimony before the House Committee regarding the facts relating to the pardon itself?

A The factual presentation was made to the House Committee. The book took those facts and added my personal reactions, experiences, et cetera.

Q In addition to adding your personal experiences, feelings and the like, did the book, to your recollection, add any facts with respect to the pardon?

A Not on my decision. The book might have added some facts as to conversations with my wife or perhaps with [19] others.

Q Did it add anything with respect to conversations with General Haig, for example?

A I believe the testimony before the committee and the facts in the book, as far as Haig are concerned -- the facts, now -- are identical.

Q Did it add anything with respect to conversations with other public officials that was not contained in

your testimony before the Hungate Committee?

A There were no additional facts as to the pardon itself. There may have been additional information as to the time of meetings with other public officials, discussions of my feelings at the time, but the facts in both cases are identical. The embellishment is primarily my feelings, or conversations that might have taken place that were not related to the facts themselves of the pardon.

Q Are the conversations to which you have just referred with Mrs. Ford or intimates of yours?

A Right.

Q Do I understand you correctly that you distinguish that from

conversations with public officials in the sense that I just asked you?

A Obviously the book shows I had conversations with Robert Hartmann, Jack Marsh. Harlow, of course, was not a [20] public official at the time, but Marsh and Hartmann were.

Q Had the facts relating to your discussion with Mr. Hartmann and Mr. Marsh previously been disclosed to the House Committee?

A I have not reviewed that testimony. Those conversations may or may not have been in the testimony. I cannot with certainty tell you whether they were a part of my testimony or not.

Q Would your testimony be the same with respect to conversations with Mr. Harlow?

A Yes, I think so.

Q That is, as you sit here today that you cannot recollect for us precisely what was in the testimony?

A I can't recall precisely whether in the testimony before the House Committee I referred to any conversations I had with Hartmann, Marsh or Harlow. Watever the record shows would be the fact.

Q I want to return now to the questions I was asking you a few moments ago about discussions with NBC with respect to an appearance by you with respect to the pardon of former President Nixon.

I would like to read to you a portion of three news columns, and then ask you if they refresh your recollection as to these matters.

* * *

[21]

Q In the first paragraph of the story in the [22] Philadelphia News of November 25, 1977 it states that

> "There is a strong possibility that former President Gerald Ford's first special on NBC, which had been scheduled for December 21, will be postponed because of a legal conflict involving the publisher of his forthcoming memoirs. The publisher, Harper & Row, has made no effort to halt the program. However, it has informed NBC that under its contract with Ford he must not discuss his pardoning of former President Richard Nixon until after the account is published by Harper & Row. Ford's memoirs will not be published until sometime in 1979."

Then, referring to paragraph 4 it says,

> "Undoubtedly, the highlight of the hour would be Ford's explanation of the Nixon pardon. Now that that use of this material is doubtful, NBC is reviewing the matter of program content and possible postponement of the premiere."

Does this refresh your recollection, President Ford, as to whether in 1977 as a result of your contract with Harper & Row a decision was reached that you would not appear on NBC television for the purpose of discussing the pardon of President Nixon?

A I never had any personal discussions with the people from NBC on this matter. It was my custom whenever there was any discussion of the several contracts to refer them to Dean Burch for his interpretation and for his [23] resolution.

Q Do you recall discussing with Mr. Burch whether you could appear on NBC and discuss the pardon, at some point in 1977?

A I am certain in our

discussions as he explained the several contracts to me that the matter came up, but the negotiations with NBC, Harper & Row were always conducted directly by him.

Q Do you have any personal recollection as to reaching a decision based on Mr. Burch's advice not to appear on television to discuss the pardon prior to publication of the book?

A Repeat that again, please.

MR. ABRAMS: Mr. Reporter, please. (The record was read.)

A The fact that I did not is the best evidence that I made such a decision.

Q And it is a fact that you did not appear --

A Not to discuss the pardon

beyond the testimony of what I had previously given to the House Committee.

Q That was because of your agreement with Harper & Row?

A Correct.

Q Directing your attention now, President Ford, to [24] Defendants' (Ford) Exhibit 5 for identification, which is the December 19, 1977 article from the Philadelphia Daily News, I would ask you to direct your attention, please, to the fifth paragraph in the first column, which starts with your name, and then the first paragraph in the next column.

A Correct.

Q Those two paragraphs state,

"Gerald Ford was being paid $1.3 million for five NBC news specials, had his long-awaited debut postponed twice. The reason turned out

to be that he also had an exclusive deal with Harper & Row to publish his memoirs that prevented him from discussing the presidency. A new deal had to be renegotiated between the network and the former president which calls for his first special to air in 1978. The subject will be foreign policy, a subject certainly that could have influence on the electorate if he decided to run for office in 1980."

Was your debut on NBC postponed twice as a result of your agreement with Harper & Row?

A There was some delay. I cannot tell you whether it was postponed twice or not. I eventually did appear with John Chancellor on a foreign policy discussion, and I don't recall the date.

Q Did you appear at all with respect to the pardon, prior to publication of the book? [25]

A Not on the pardon specifically.

MR. ZISSU: You are asking

about NBC?

MR. ABRAMS: Yes.

A (Continuing) Not specifically. Part of the agreement also provided that at various times I would do a news special, which I did, over a period of three or four years. I don't recall whether on any of those particular news pieces that I ever discussed the pardon.

Q Do you believe that you did?

A Certainly not beyond any of the testimony that I gave to the Committee.

* * *

[28]

Q I would like to pass to you now and have you reread to yourself the article in The Nation which leads to this deposition today. It is a few

pages long, and I would propose we take a 10-minute break to give you a chance to read the whole thing.

[29]

Let me mark it first as Defendants' (Ford) Exhibit 7.

(Article referred to marked Defendants' (Ford) Exhibit 7 for identification, this date.)

(A recess was taken.)

Q President Ford, when to your recollection is the last time before right now that you looked at The Nation article of April 7, 1979?

A My best recollection is that I read it at the time it was published, a copy was sent to me, and that would be on or about April 7, 1979.

Q And you now have reread it at my request?

A I have.

Q You testified earlier that your memoirs added to the public record with respect to your subjective feelings with respect to the pardon of President Nixon. Are any of those subjective feelings reflected in The Nation article which has been marked as Exhibit 7?

A No, but I am struck with a sentence in the fourth paragraph in the article, which reads as follows: "Ford's account of the Nixon pardon contains significant new detail on the negotiations and considerations that surrounded it."

I think the subjective feelings that I expressed [30] in the book would fall under the heading of that sentence.

Q Is there anything in The Nation article which sets forth your subjective feelings?

* * *

[31]

A Will you repeat the question, please.

Q Yes, sir. The question is whether the article published by The Nation under the date of April 7, 1979 sets forth any of your subjective feelings with respect to the pardon of President Nixon.

* * *

[32]

A If I might take one as an illustration, on page 363 of the exhibit, the third paragraph down, there is a sentence in the article which reads

as follows: "Rather, he did it because he had 'to get the monkey off my back one way or the other.'"

That certainly is a reflection of a subjective feeling, and it, to my best recollection, was not in my testimony, in those words, at least, before the House Committee on the Judiciary.

That is one illustration.

Q Is there anything else?

A I notice one error in the article. On page 363 the article says, "Jackson, Michigan." It was Jackson, [33] Mississippi.

Again on page 363, the first paragraph -- it follows the quote from the Ruth memorandum, the article says, "Ford decided that court proceedings against Nixon might take six years, that

Nixon 'would not spend time quietly in San Clemente,' and 'It would be virtually impossible for me to direct public attention on anything else.'"

That was the subjective feeling I has as to what might transpire over the six-year time span.

Those are several illustrations.

Q Let me pause on that one. To the best of your recollection, was the disclosure in your memoirs that you believed Mr. Nixon "would not spend time quietly in San Clemente" and that "It would be virtually impossible for me to direct public attention on anything else" made for the first time anywhere in the memoirs?

A Phrased as such, yes.

Q Had you previously, to the best of your recollection, publicly stated in words or substance that one reason for your pardon of President Nixon was that if you had not pardoned him public attention would have been over-focused on President Nixon's potential criminal charges?

A The principal public reason I gave on more than one occasion was that I had a full-time job with our then [34] current domestic and foreign policy problems and that the time that I was being asked to devote to listening to lawyers arguing about what I ought to do with the tapes, and so forth, was preempting too much time, and that in order to do my job as president for the country as a whole I should not be

diverted with this kind of time consumption.

That was the principal reason for my decision to give the pardon. It was the only way I could clear the decks and devote my full time and attention to the public business.

Q And that reason or those reasons had previously been disclosed, had they not?

A Oh, I have said that from the very beginning.

Q You read earlier, President Ford, from the first page of The Nation article in question the line which says that your account of the Nixon pardon "contains significant new detail on the negotiations and considerations that surrounded it."

Do you think it was an accurate statement to say that your account did contain significant new details on the negotiations?

A Not on the negotiations, no; on the considerations primarily the subjective considerations, yes.

* * *

[49]

EXAMINATION BY MR. ZISSU:

Q Mr. President, I am going to direct your attention to certain portions of Defendants' Exhibit 7 for identification to this examination, which is The Nation article, and I would ask that a copy be made available to you, if possible.

[50]

A I gave my copy back to somebody.

MR. ZISSU: Does somebody have the marked one that is the official one to this deposition?

(Discussion off the record.)

Q There was some questioning by Mr. Abrams as to what aspects of that article reflected your personal feelings with respect to the pardoning, and personal reactions, and you gave him some aspects, as I think you termed it, "illustrative."

Now I want to direct your attention to certain other portions of that article and ask you whether these are also illustrative.

On the first page of the article, at the bottom of the last line of that article, there is a phraseology "Ford was deeply hurt by Haig's" -- and

then it continues on to page 363 -- "revelation."

Is that a portion of the article that reflects your subjective feeling in relation to the events relating to the pardon?

A Yes. It was a personal reaction. I was deeply hurt by the fact that Nixon had repeatedly assured me that he was not involved in Watergate and that the evidence would prove his innocence.

Q And there is further, continuing the statement, [51] "Ford had believed him . . ."

Is that similarly a reflection of your personal feelings?

A I had believed Mr. Nixon because of his repeated assertions, yes.

Q Continuing into the next paragraph there is the statement in the middle of the paragraph, "Although Ford said it would be improper for him to make any recommendation, he basically agreed with Haig's assessment . . ."

Is the statement as to what you considered improper and what you basically agreed with also a reflection of your personal reactions?

A It certainly was a personal reaction that it would be improper for me to make any recommendation.

Q In the next column on page 363, at the end of the second paragraph there is a quote, "'Had I said otherwise at that moment,' he writes, 'the whole house of cards might have collapsed.'"

Is that also reflective of

your personal feelings with relation to the events leading to the pardon?

A Well, that particular statement related to what I felt when I was attending a press conference in Jackson, Mississippi. That was a personal feeling at the time that I could not change my public statements even though I had some [52] information given to me by Mr. Haig that the situation might be different than it had been previously.

Q And in the next paragraph there is a quotation from your manuscript about having "compassion for Nixon as an individual" and the fact that that had not prompted your decision at all.

Is that also reflective of your personal feelings and reactions to the events?

A Yes, sir.

Q In the next paragraph there is a quoting of the word "crucial" as to certain information and reasoning of, I guess it is Mr. Jaworski or Mr. Ruth.

Is that also reflective of your personal feelings?

A Correct.

Q Continuing down into the language about your statement that "Nixon would not spend time quietly in San Clemente . . . It would be virtually impossible for me to direct public attention on anything else," is that also reflective of your personal feelings with respect to the facts?

A That is, and I think I used that as an illustration when I responded to Mr. Abrams.

Q I made a mistake in including that one.

Continuing further, in the third paragraph from [53] the bottom of that page, in the last line there is a statement ". . . but Ford was reluctant to do that."

Is that also indicative of your personal reactions and feelings relating to the events leading up to the pardon?

A Yes, I believe so.

Q And continuing on the next page, and please correct me if I missed this one, at the beginning of the page at the top there is reference to "the President's ability to discuss Watergate objectively was almost nonexistent."

Is that indicative of

something that was a personal impression or to which you had a personal reaction with respect to Mr. Nixon?

MR. ABRAMS: I object to the form of the question on the grounds that it is incomprehensible.

Q Let me direct your attention to the entire quote: "His few meetings with his client had shown him that the former President's ability to discuss Watergate objectively was almost nonexistent."

Does the inclusion of that statement in your book have anything to do with your personal reaction to the events leading up to the pardon?

A Well, it certainly was indicative of the mental condition of Mr. Nixon, and subjectively that probably

had some impact on my decision, although, as I have said [54] repeatedly, publicly as well as here today, the primary basis for my decision was one of public policy.

Q And continuing further, below the paragraph referring to Yale Law School, in the next paragraph there is a statement, "If I made the trip it would remind everybody of Watergate and the pardon. If I didn't, people would say I lacked compassion."

Is that also indicative of your personal feelings in relation to the pardon?

A Of course, that was after the fact. That was probably a month after the decision by me to grant the pardon. That was definitely a subjective

expression on my part as to why I should or should not stop in the hospital and see Mr. Nixon.

Q Finally, on the discussion of Nixon's character, does your description towards the end of this article at the bottom of page 364 about Nixon's character reflect anything in relation to the pardon, in terms of your feelings?

A Subjectively, yes.

Q Could that similarly be said of the description of how Mr. Nixon appeared "stretched out flat on his back," et cetera, even though that visit to the hospital to him took place after the pardon?

MR ABRAMS: I object to the form of the question.

[55]

A There is no doubt in my mind as I saw Mr. Nixon on the hospital bed -- and I never saw anybody closer to death than he at that time -- that that was a subjective reaction that after the fact to an extent justified my decision.

Q Finally on this subject, on the last page of the article, page 365, there are statements about your having wondered whether Nixon had known in advance about Watergate, and a comment on Nixon's state of mind at the time of his resignation.

Are those statements also reflective of your personal feelings towards the events?

A Are you referring to the quotation, "Nixon was out of touch with reality"?

Q Yes.

A Very definitely. That was a reaction that I had as my wife and myself listened to his television speech announcing that he was resigning the next day.

* * *

[56]

EXAMINATION BY MR ABRAMS:

Q President Ford, do you believe that the question of why you pardoned President Nixon is a matter of public significance?

A Yes, and that is why I testified before the House Committee on the Judiciary, voluntarily.

Q Do you believe that your state of mind at the time you pardoned President Nixon is a matter of public significance?

A No. I think the factual justification was a matter of public significance but the internal workings of my mind, the subjective things that took place over that period of time, I do not think that qualifies in the same way as the factual recounting of what took place.

Q Are the reasons that you pardoned Nixon matters of public significance?

A The reasons that I gave to the House Committee were important information, and that is what I set forth [57] before the House Committee on the Judiciary.

Q Let me take an example from Mr. Zissu's recent questions to you, page 363 of The Nation article. You

said in your manuscript, and The Nation quotes in its article in paragraph 2 on the second column of page 363, that had you said otherwise at the time you were speaking at a Jackson, Mississippi luncheon audience, "the whole house of cards might have collapsed."

Is it your view that that is a matter of private property interest of yours?

MR. MILLER: I am going to object to the form of the question.

MR. ZISSU: I object to the form of the question.

MR. MILLER: Also as to its relevance.

Q As you sit here today, President Ford, do you believe that your belief at the time you spoke in Jackson,

Mississippi, that had you said anything other than what you then said, "the whole house of cards might have collapsed," is a matter of public interest?

A I think you have to relate that statement by myself which was quoted to the situation as it existed on August 3, 1974. Prior to that time I had been told, and I believed, that Mr. Nixon did not know of the Watergate [58] prior to its being carried out. I had been told the morning of or during the day of August 3 that there might be some additional evidence, but I had not heard it myself. It was a very tense time in our history, and for me to publicly make statements based on this allegedly new information would potentially have created an additional crisis.

And since I had not personally heard the so-called "new evidence," I did not feel that I would be acting properly to make any statement at that time different from what I had been saying previously.

Q Had you told the American public at any point prior to the publication of your manuscript what you have just told us now?

A Repeat that again.

Q Had you told the American public, in any form, prior to the time your manuscript was published of the information that you have just told us in the last three or four sentences of your last answer?

A No.

Q Why not?

A Because of the tenseness of the situation that existed from August 1 when I was first told what might be revealed publicly with the tape of June 23. That was very devastating evidence, according to the people that told me, [59] and until I had heard myself or had read a transcript of it, it would have been, I think, unwise for me to take any position different from the one that I had taken for a number of months.

Q Is there any reason that subsequent to the resignation of President Nixon and prior to your publication of your manuscript that you did not disclose that information to the public?

A First, nobody asked me.

Q Nobody asked you what you were -- I'm sorry --

A Nobody asked me that precise question. But in the writing of the book it was a part of the sequence that took place from August 1 until August 9, and it seemed a proper thing to include in the book as an explanation of why I did not say anything, even though I had this alleged information that had been given me on August 1.

Q Now, the alleged information is that which Haig told you; is that correct?

A That is right.

Q Do you think it is appropriate for historians to pass judgment on the conduct of presidents within five years of their leaving office?

A We have people passing judgment on the performance of presidents on a daily basis.

[60]

Q Would it have been useful, do you think, for individuals passing judgment on your performance as president to have had the information that you provided in your book with respect to the pardon?

A You mean from the date of the pardon up until the time the book was written?

Q Yes, sir.

A I think it was important to them to have what I wrote in the book, based on my thoughtful preparation in the book, yes.

Q Would it have been important for them to have had it earlier?

A Not necessarily my subjective feelings, no. They had on the record

the factual presentation, but the subjective feelings I had in the period of time I think could best be made available for history by the writing of the book.

Q A final question or two, President Ford.

If you would direct your attention to page 363 of The Nation article to the material three paragraphs up from the bottom. You were asked by Mr. Zissu whether it was one of your impressions or subjective reactions that you were "reluctant" to "condition the pardon on Nixon agreeing to settle the question of who would retain custody and control over the tapes and Presidential papers that might be relevant [61] to various Watergate proceedings . . ."; is that correct, sir?

A To a degree, but I reiterate what I have said many times publicly and restated here: that the basic reason I gave the pardon was for public policy reasons. This might well have been a subjective reaction.

Q Do you believe that your reluctance to condition the pardon in the fashion that Mr. Buchen had urged upon you was a matter of public interest?

A The public interest was the basic reason I gave the pardon, and all the subjective decisions might have bolstered it, but the basic reason was that I needed a hundred percent of my time on public matters, domestic and foreign, and that as much as 25 percent of my time many days during that period was

spent listening to lawyers arguing the pros and cons as to what to do with the tapes and documents and so forth, and I finally decided that the country needed a hundred percent of my time on the public business and not 25 percent of my time on Mr. Nixon's problem.

Q A final question: Do you believe that the fact that President Nixon misled you as to the facts of the Watergate matters was a matter of public significance?

A If my recollection is correct, I so testified before the House Committee.

Q Was the fact that you had believed President [62] Nixon at the time he made those statements to you also a matter of public interest?

A I believe either directly or otherwise I so stated in my testimony.

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[Portions of Defendants' Exhibit A]

[1218]

For Immediate Release

HARPER & ROW AND THE READER'S DIGEST
COPUBLISH GERALD FORD'S AUTOBIOGRAPHY

Gerald R. Ford's autobiography, A Time to Heal, is at once the chronicle of a remarkable political career and the human story of a dedicated but unassuming man propelled by history into taking on the immense burdens of the presidency. Recounting his life, from modest Midwestern beginnings to the White House, Gerald Ford provides a basis for our understanding of the man, his origins, his values and his assumptions about the nature of American social and political life.

At the outset of A Time to Heal

(Harper & Row/Reader's Digest, $12.95, June 6, 1979), Mr. Ford describes one of the most trying times in our nation's history, the tense, crucial days when he -- and the country -- waited for President Nixon to step down from office. What really happened behind the scenes? What nerve-wracking, challenging meetings were there with White House aides, the Congress, the press, his own family? Gerald Ford answers these questions fully, openly and fairly. From General Alexander Haig's first telephone call to the oath-taking ceremony eight days later, a cascade of events, many of them revelations, rush across the pages of Mr. Ford's book. Readers will learn for the first time his thoughts about these

events; his assessments of Nixon, Haig and others; his vivid description of Nixon's last Cabinet meeting; his detailed explanation of how the Ford team managed a smooth transfer of the reins of government.

Michigan Football and Yale Law

Gerald Ford assumed the presidency under extraordinary circumstances. That he was equal to the task he credits to his upbringing. He writes warmly of his mother and stepfather, and of the values they instilled in him. He was shaped by their honest virtues, and by a strong sense of competition that his early life drilled into him. There were highs -- he was a football hero at Michigan, good enough to receive professional offers; and unexpected blows -- the

disheartening meeting with his real father. And it took all his persistence to get into Yale Law School and maintain good marks while holding down a full-time job. [1220]

His budding law career was cut short by Pearl Harbor and four years in the Navy, including combat at sea. After the war he returned to the law and soon became interested in politics. In 1948 he won election to Congress from Michigan's Fifth District. By then, he writes, "I had pretty well formed the political philosophy I've maintained ever since. On economic policy, I was conservative -- and very proud of it. I didn't believe that we could solve problems simply by throwing money at them. On social issues, I was a moderate; on questions of foreign policy, a liberal."

With his new bride, Betty, he headed for Washington and what would prove to be twenty-five years as a Congressman. Mr. Ford's rise to the position of Minority Leader, as he tells it, is a fascinating sketch of what day-to-day politics is all about.

A Trying Vice Presidency

Nixon and his aides never understood how to deal with Congress, writes Ford, "and it developed into one of the worst failings of his Administration." Ford was convinced that Nixon nominated him as Vice President, after Agnew's resignation, "because he wanted to pick someone who could help repair his frayed relations with Capitol Hill and the media." Afterwards he learned that he was actually fourth on Nixon's list.

His time as Vice President was a trying one for Ford. He tells how he was used by Nixon speech writers and hampered by Nixon staffers. But the big problem, of course, was Watergate. "I was in an impossible situation," he writes. "I couldn't abandon Nixon, because that would make it appear that I was trying to position myself to become President. Nor could I get too close to him, because if I did, I'd risk being sucked into the whirlpool myself. It was a day-by-day balancing act and I detested the whole thing."

Pardoning a President

One of the first controversial acts of Ford's presidency was his selection of a Vice President. He tells in detail what he felt was needed in a candidate

and how he came to choose Nelson Rockefeller. But the biggest controversy of Ford's presidency would concern his pardon of Richard Nixon. Characteristically, he leads into the subject by revealing how his own attitude caused him to misread the public mood. [1221]

He was looking forward to his first press conference, anticipating questions on the economy, staff reorganization and foreign policy. His aides warned that the press was interested only in Nixon. "There were too many other things of vital importance to the country at home and abroad, and I was sure reporters would ask about them." Then he adds: "I was totally wrong." Everyone was interested in only one issue, and for the next ten days it was the issue he would agonize over.

"I simply was not convinced," he writes, "that the country wanted to see an ex-President behind bars. We are not a vengeful people; forgiveness is one of the roots of the American tradition. And Nixon, in my opinion, had already suffered enormously. His resignation was an implicit admission of guilt, and he would have to carry forever the burden of his disgrace. But I wasn't motivated primarily by sympathy for his plight or by concern over the state of his health. It was the state of the country's health at home and around the world that worried me."

His discussion of all the ramifications of a pardon -- as opposed to "the spectacle of a former President on trial" -- reveals how thoroughly Ford

explored the issue. There was the question of determining his legal authority to offer a pardon before an indictment; the legal opinion that it was better to act early rather than late; a painful scene between Nixon and a Ford aide attempting to get a statement from the former President; the weighing of pros and cons, and the arguments against a pardon; questions of timing, and the effect of a pardon on the trials of Watergate defendants; and politics, in particular the upcoming Congressional elections. "I concluded," Ford says, "that the national interest overrode any political considerations. That was the easiest objection to confront."

In the end he granted the pardon. "Years before," he writes, "at Yale Law

School, I'd learned that public policy often took precedence over a rule of law. Although I respected the tenet that no man should be above the law, public policy demanded that I put Nixon -- and Watergate -- behind us as quickly as possible." When it was done, "it was an unbelievable lifting of a burden from my shoulders. I felt very certain that I had made the right decision, and I was confident that I could now proceed without being harrassed by Nixon or his problems any more." And he adds: "It didn't take me long, however, to discover I was wrong." [1222]

Problems at Home and Abroad

His reactions to World leaders display his instinctive warmth, even when he recognizes in them ideological foes.

He writes at length of his meetings with Brezhnev and Mao, and his hard wrangling to improve the chances for peace while maintaining national security. At times his wrangles with Congress seem more formidable. Ford writes about them from a unique perspective, having been himself a Congressman for so long. And his criticism of their actions, especially on foreign policy and excessive spending, is often bitingly blunt.

One of the most dramatic moments of Ford's presidency came when the Mayaquez was seized by the Cambodians. He recounts the incident in full, revealing the role played by White House photographer David Kennerly. And he also reveals Defense Department bumbling and raises some questions that even now

remain unanswered. Two more moments of drama came in California, fifteen days apart, when attempts were made to assassinate him.

Ford is especially candid about his relations with staff members and his Cabinet, most particularly his run-ins with Defense Secretary James Schlesinger. "My first brush with Schlesinger had occurred in March 1974," he writes, "when I was Vice President. . . Our personal relationship, which had never been good, slid downhill after I became President." Ford tells how he "had to admonish Schlesinger about newspaper stories suggesting that he had put our armed forces on alert just prior to Nixon's resignation." For the sake of continuity in United States

policy, he kept Schlesinger on. "Had I not felt that way, I would have found a new Secretary of Defense as quickly as possible." Months later, when he learned exactly how the incident had occurred, Ford concluded that "I had been remiss in not getting rid of him;" there was no alternative.

"Schlesinger's peculiar behavior was only one of several reasons why he would have to go. . . Somehow Schlesinger had succeeded in projecting the public image of a hawk. . . In reality, the reverse was true. His views often were more dovish than mine. He was obviously unsuccessful in dealing with Congress, and his rivalry with Kissinger was making me increasingly uncomfortable. But I must also admit that his aloof,

frequently arrogant manner put me off. I never could be sure he was leveling with me." [1223]

The Campaign Trail

As a Presidential candidate Ford had "all the liabilities of an incumbent President -- and few advantages." He had to build a political organization from scratch; he had antagonized special interest groups; and he had used the veto frequently. Above all he underestimated Reagan's bid until almost too late. His campaign against Reagan for the Republican nomination becomes a cliff-hanger in the retelling. Ford is, as ever, straightforward in detailing his campaign flubs and triumphs. He discusses how and why he picked Dole as his running mate, his campaign strategy,

what he thought of Carter as a campaigner (who "played fast and loose with the facts"), his disappointment in Reagan's not campaigning for him, and his stubborness about admitting his Eastern European gaffe during the second debate.

A Nation Healed

Ford expressed his vision of this nation most eloquently on July 4, 1976, the nation's two-hundredth birthday: "In the space of two centuries, we have not been able to right every wrong, to correct every injustice, to reach every worthy goal. But for two hundred years we have tried and we will continue to strive to make the lives of individual men and women in this country and on this earth better lives -- more hopeful

and happy, more prosperous and peaceful, more fulfilling and more free. This is our common dedication and it will be our common glory as we enter the third century of the American adventure."

Reflecting on that memorable day, he remarks: "Not a single incident marred our festival. The nation's wounds had healed. We had regained our pride and rediscovered our faith and, in doing so, we had laid the foundation for a future that had to be filled with hope." President Ford's role in the healing process, in preparing the foundation for a hopeful future, has not gone unrecognized. In fact, after taking the oath of office, President Carter's first words were: "For myself and for our nation I want to thank my

predecessor for all he has done to heal our land." A Time to Heal is Mr. Ford's own account of all that he did.

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[Caption omitted]

ADDENDA TO DEFENDANTS' POST-TRIAL MEMORANDUM OF LAW

To facilitate the application of the legal principles set forth in the defendants' memorandum of law, the defendants have prepared three aids for the Court: (1) a written analysis of each sentence of the article setting forth separately as to each whether any copyrightable material can possibly be said to be involved along with a color-coded analysis of The Nation article illustrating the application of the sentence-by-sentence analysis; (2) a comparison of the article with the manuscript (defendants' version of Plaintiffs' Exhibit 11) [contained in the Appendices to the Petition for

Certiorari ("Pet.") as Appendix E at E-1], attached as Addendum B; [and] (3) a comparison of the Hungate Committee testimony of former President Ford (Deft.Ex. B) with the manuscript (Pl. Ex. 1), attached as Addendum C . . . .

ADDENDUM A TO DEFENDANTS' POST-TRIAL MEMORANDUM

Sentence-by-Sentence Analysis of The Nation Article

Paragraph 1:

In his memoirs, A Time to Heal, which Harper & Row will publish in late May or early June, former President Gerald R. Ford says that the idea of giving a blanket pardon to Richard M. Nixon was raised before Nixon resigned from the Presidency by Gen. Alexander Haig, who was then the White House chief of staff. (Pl.Ex. 10 p. 1) [Pet. at A-31]

Plaintiffs have conceded that this paragraph does not use any material from the manuscript. (Pl.Ex. 11 p. 1) [Pet. at E-2]

Paragraph 2:

Ford also writes that, but for a misunderstanding, he might have selected Ronald Reagan as his 1976 running mate, that Washington lawyer Edward Bennett Williams, a Democrat, was his choice for head of the Central Intelligence Agency, that Nixon was the one who first proposed Nelson Rockefeller for Vice President, and that he regretted his

"cowardice" in allowing Rockefeller to remove himself from Vice Presidential contention. Ford also describes his often prickly relations with Henry Kissinger. (Pl.Ex. 10 p. 1) [Pet. at A-31]

The first sentence takes only information and no expression from the manuscript. The information is derived from at least nine manuscript pages, scattered throughout the manuscript. Mr. Nixon's recommendations to Mr. Ford are both statements of government officials and the expression of a person other than Mr. Ford. In addition, much of the material in the manuscript about Nelson Rockefeller consists of Mr. Rockefeller's conversations with Mr. Ford. Under the analysis above, such conversation is a government work, specifically excepted from copyright protection; moreover,

Mr. Rockefeller's words are not original to and thus not copyrightable by Mr. Ford. (Pl.Ex. 1 607-08, 490-91, 42, 44-45, 495-96)

Plaintiffs have conceded that the second sentence of paragraph 2 uses no material from the manuscript. (Pl.Ex. 11 p. 3) [Pet. at E-6]

Paragraph 3:

The Nation obtained the 655-page typescript before publication. Advance excerpts from the book will appear in Time in mid-April and in The Reader's Digest thereafter. Although the initial print order has not been decided, the figure is tentatively set at 50,000; it could change, depending upon the public reaction to the serialization.

Plaintiffs have conceded that paragraph 3 uses no material from the manuscript. (Pl.Ex. 11 p. 3) [Pet. at E-6]

Paragraph 4:

Ford's account of the Nixon pardon contains significant new detail on the negotiations and considerations that surrounded it. According to Ford's version, the subject was first broached to him by General Haig on August 1, 1974, a week before Nixon resigned. General Haig revealed that the newly transcribed White House tapes were the equivalent of the "smoking gun" and that Ford should prepare himself to become President.

Plaintiffs have conceded that the first sentence of paragraph 4 uses no material from the manuscript. (Pl.Ex. 11 p. 3) [Pet. at E-6]

The second sentence of paragraph 4 uses only information from the manuscript and no expression. The manuscript states: "on the warm, cloudy morning of August 1, 1974, I received a telephone call from General Alexander M. Haig." (Pl.Ex. 1 p. 1) The article states: "the subject was first broached

to [Ford] by General Haig on August 1, 1974, a week before Nixon resigned." (Pl.Ex. 10) In addition, much of the manuscript consists of then General Haig's statements to President Ford, which are government works and not original to Mr. Ford.

The third sentence of paragraph 4 cannot be said to infringe any rights of plaintiffs for several reasons. First, aside from the cliche "smoking gun," the sentence repeats no language from the manuscript but contains only facts. In addition, the text from which it derives consists of statements by General Haig, some paraphrased, some in quotation, e.g., "Are you ready, Mr. Vice President, to assume the Presidency in a short period of time" (Pl.Ex. 1

p. 4), and thus is not copyrightable by the plaintiffs because it is the expression of a person other than former President Ford and is a government work. Finally, the phrase "Are you ready, Mr. Vice President, to assume the Presidency in a short period of time" is an almost direct quote from the Pardon Testimony, which was, in fact, Mr. Armbrister's source for this portion of the manuscript. (Tr. at 76-77; Deft.Ex. C) (See Pl.Ex. 1 pp. 1-4)

Paragraph 5:

Ford was deeply hurt by Haig's revelation: "Over the past several months Nixon had repeatedly assured me that he was not involved in Watergate, that the evidence would prove his innocence, that the matter would fade from view." Ford had believed him, but he let Haig explain the President's alternatives.

The first phrase of the first sentence, "Ford was deeply hurt by Haig's revelation" is a paraphrase of the manuscript.* Because it contains only information and not expression, it infringes no copyright held by plaintiffs.

The quotation beginning "Over the past several months" consists of a report of words spoken by Mr. Nixon to Mr. Ford and as such is not copyrightable by Mr. Ford, both because it is another's expression and because it is an uncopyrightable government work. The last sentence reports only the information from the manuscript and

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* According to Plaintiffs' Exhibit 11, plaintiffs do not claim that the phrase "by Haig's revelation" uses material from the manuscript. (Pl.Ex. 11 p. 4) [Pet. at E-8]

not the expression. The article here reverses the narrative sequence of the manuscript; in the manuscript, Mr. Ford relates the conversation with General Haig and then discusses his prior belief in Mr. Nixon. (See Pl.Ex. 1 p. 7)

Paragraph 6:

> He could "ride it out" or he could resign, Haig said. He then listed the different ways Nixon might resign and concluded by pointing out that Nixon could agree to leave in return for an agreement that the new President, Ford, would pardon him. Although Ford said it would be improper for him to make any recommendation, he basically agreed with Haig's assessment and adds, "Because of his references to the pardon authority, I did ask Haig about the extent of a President's pardon power."

The first sentence reports only facts and does not, except for "ride it out," repeat any language from the manuscript. The manuscript reads: "The first was that he could try to

'ride it out' by letting impeachment take its natural course through the House and Senate trial, fighting against conviction all the way. His second option was to resign." (Pl.Ex. 1 pp. 4-5) The article collapses that information into a single short sentence. The Nation's use of the phrase "ride it out" can hardly be considered the "copying" of expression. The phrase is set out in quotes in the manuscript and appears, as discussed below, in the Pardon Testimony. The second sentence similarly reports facts and does not repeat expression.

In addition, the first two sentences very closely track Mr. Ford's Pardon Testimony (Deft.Ex. B p. 94), and therefore are uncopyrightable because

they are public domain material and because they are a government work. Mr. Armbrister testified that he used here President Ford's "very words before the Hungate Committee." (Tr. at 84) Moreover, this portion of the manuscript recounts General Haig's statement to then Vice President Ford and this is not copyrightable as the expression of someone other than Ford, and as a statement by a government official.

The third sentence contains a simple report of the facts and a quotation. The reporting uses no expression. In addition, the manuscript material from which the sentence derives tracks the Pardon Testimony (Deft.Ex. B p. 94) and consists entirely of conversations between government

officials, and thus is uncopyrightable. (Pl.Ex. 1 pp. 4-6)

Paragraph 7:

> "It's my understanding from a White House lawyer," Haig replied, "that a President does have authority to grant a pardon even before criminal action has been taken against an individual."

The quotation is contained verbatim in the Pardon Testimony and therefore is both a government work and in the public domain. (See Pl.Ex. 43 p. 1016; Deft. Ex. B pp. 93-94) As a statement by General Haig, it is both a government work and the expression of a person other than Mr. Ford. (See Pl.Ex. 1 p. 6)

Paragraph 8:

> But because Ford had neglected to tell Haig he thought the idea of a resignation conditioned on a pardon was improper, his press aide, Bob Hartmann, suggested that Haig might well have returned to the White House and told

President Nixon that he had mentioned the idea and Ford seemed comfortable with it. "Silence implies assent."

Except for the last sentence, the paragraph consists not of expression but of a report of facts contained in the manuscript, which reads:

> "After several moments, Hartmann interrupted my reverie. I asked him to schedule an appointment with St. Clair first thing in the morning; then I told him about my latest conversation with Haig. As I repeated the options that Haig had listed for me, warning bells seemed to go off inside his head. 'That's why you should have had a witness there,' he said.
>
> "'What do you mean?'
>
> "'That last option Haig mentioned, that Nixon resign in return for an agreement that he receive a pardon from the new President. I don't like that at all.'
>
> "'But, Bob,' I replied, 'Al wasn't suggesting that. It was just one of the ideas that he said were being kicked around by people at the White House.'

> "'I know, I know. But Haig didn't come over here to go away empty-handed. And he didn't discuss this delicate matter without Nixon's knowing about it. And he mentioned the pardon option, and you sat there listening to him. Well, silence implies assent. He probably went back to the White House and told Nixon that he'd mentioned the idea and that you weren't uncomfortable with it. It was extremely improper for him to bring the subject up.'" (Pl. Ex. 1 pp. 8-9)

Because both Messrs. Ford and Hartmann were government officials their discussion is an uncopyrightable work of the United States government. In addition, Mr. Hartmann's words were not original to Mr. Ford. Mr. Armbrister testified that the phrase "silence implies assent" quoted in The Nation came directly from Mr. Hartmann. (Tr. at 89; see Deft.Ex. D p. 4) (See Pl.Ex. 1 pp. 8-9)

Paragraph 9:

Ford then consulted with White House special counsel James St. Clair, who had no advice one way or the other on the matter more than pointing out that he was not the lawyer who had given Haig the opinion on the pardon. Ford also discussed the matter with Jack Marsh, who felt that the mention of a pardon in this context was a "time bomb," and with Bryce Harlow, who had served six Presidents and who agreed that the mere mention of a pardon "could cause a lot of trouble."

The only relationship of the first sentence -- about Mr. Ford's meeting with James St. Clair -- to the manuscript is that it reports the facts of Mr. Ford's conversations with Mr. St. Clair. Moreover, both Mr. St. Clair and President Ford held positions in the federal government and their statements consequently are works of the United States government. Mr. Armbrister testified that the Pardon Testimony was

the source for the language that Mr. St. Clair commented "that he had not been the source of any White House staff opinion about a president's power to issue pardons." (Pl.Ex. 1 p. 15) (Tr. at 91; see Deft.Ex. B p. 95) Finally, Mr. St. Clair's statement originated with him and thus cannot be copyrighted by Mr. Ford.

The second sentence of paragraph 9, except for the two short quotations, reports only the facts contained in the manuscript and not the expression. Then Vice President Ford's discussion with his aide, Jack Marsh, is a work of the United States government and not subject to copyright. Both Mr. Marsh's and Mr. Harlow's statements, small parts of which are quoted in the article, did not

originate with Mr. Ford and cannot be copyrighted by him. (See Pl.Ex. 1 pp. 14-16, 18)

Paragraph 10:

> As a result of these various conversations, Vice President Ford called Haig, and read him a written statement: "I want you to understand that I have no intention of recommending what the President should do about resigning or not resigning and that nothing we talked about yesterday afternoon should be given any consideration in whatever decision the President may wish to make."

The lead-in phrase before the quotation is fact from the manuscript, not expression. The manuscript's version of this is:

> "We agreed that the only thing I could do would be to call Haig in the presence of witnesses and button this thing down. Minutes later, Haig was on the line. I had written out in longhand what I wanted to say to him, and I read it slowly so there could be no ambiguities." (Pl.Ex. 1 p. 19)

The quotation in the article of then Vice President Ford's statement to General Haig does not infringe any copyright held by plaintiffs. Mr. Armbrister testified that this statement had been derived virtually verbatim from the Pardon Testimony. (Tr. at 93; Deft.Ex. B p. 95)* This statement, having been written down by President Ford, is unambiguously a work of the United States government. Plaintiffs' assertion that this document is no longer in existence is irrelevant to the conclusion that the statement

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* This testimony by Mr. Armbrister is a retraction of the assertion previously made in an affidavit submitted to this Court [the District Court] that the statement to General Haig was recreated without the aid of any documents and forms the central literary body of the book. (Deft. Ex. J; Tr. at 96-97)

was written by then Vice President Ford for the purpose of communicating to the White House Chief of Staff, General Haig, Mr. Ford's position that no promises had been made concerning the pardon of President Nixon.

Paragraph 11:

Despite what Haig had told him about the "smoking gun" tapes, Ford told a Jackson, Mich., luncheon audience later in the day that the President was not guilty of an impeachable offense. "Had I said otherwise at that moment," he writes, "the whole house of cards might have collapsed."

The first sentence of paragraph 11 reports the information contained in the manuscript and not the expression. Plaintiffs concede that the first phrase of this sentence does not infringe any copyrighted material. (Pl.Ex. 11 p. 7) [Pet. at E-14] The second sentence in The Nation article is a quotation of

arguably copyrightable material from the manuscript. (See Pl.Ex. 1 p. 21)

Paragraph 12:

In justifying the pardon, Ford goes out of his way to assure the reader that "compassion for Nixon as an individual hadn't prompted my decision at all." Rather, he did it because he had "to get the monkey off my back one way or the other."

The quotations in this paragraph of the article are of arguably copyrightable material. The rest of the paragraph is simply context for the quotations and uses no expression from the manuscript. The plaintiffs concede that the phrase "in justifying the pardon" does not use material from the manuscript. (Pl.Ex. 11 p. 7) [Pet. at E-14] (See Pl.Ex. 1 pp. 265-66, 234-36)

Paragraph 13:

The precipitating factor in his decision was a series of secret meetings his general counsel, Phil Buchen, held with Watergate Special Prosecutor Leon Jaworski in the Jefferson Hotel, where they were both staying at the time. Ford attributes Jaworski with providing some "crucial" information -- i.e., that Nixon was under investigation in ten separate areas, and that the court process could "take years." Ford cites a memorandum from Jaworski's assistant, Henry S. Ruth Jr., as being especially persuasive. Ruth had written:

> "If you decide to recommend indictment I think it is fair and proper to notify Jack Miller and the White House sufficiently in advance so that pardon action could be taken before the indictment." He went on to say: "One can make a strong argument for leniency and if President Ford is so inclined, I think he ought to do it early rather than late."

The first sentence* condenses information from the book. In contrast

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* Plaintiffs concede that the phrase "The precipitating factor in his decision was" does not infringe any of plaintiffs' rights. (Pl.Ex. 11 p. 8) [Pet. at E-16]

to the article, the manuscript uses several sentences to state the same information:

> "For the past several days, Buchen had also been meeting with Jaworski. Their contacts had been facilitated by the fact that both men were staying at the Jefferson Hotel. They could shuttle between floors without attracting undue attention." (Pl.Ex. 1 p. 246)

The second sentence largely consists of factual reporting. While use of the two quotations might possibly be construed as use of expression, the presence of these three words in a paragraph otherwise containing only facts does not rise to the level of copying expression.

The third sentence is once again a simple reporting of facts and not copying of expression.

Plaintiffs hold no copyright in the paragraph from the memorandum by Henry Ruth. This memorandum is a government document, written to Mr. Jaworski by his assistant. Mr. Armbrister obtained the memorandum from Mr. Jaworski's book (Tr. at 99-100; Pl.Ex. 44 p. 2046; Deft.Ex. PP p. 229), which was published and copyrighted before President Ford's book. Nor did this expression originate with Mr. Ford. (See Pl.Ex. 1 pp. 246-40)

Paragraph 14:

Ford decided that court proceedings against Nixon might take six years, that Nixon "would not spend time quietly in San Clemente," and "it would be virtually impossible for me to direct public attention on anything else."

The first section of the sentence relays facts contained in the manuscript. The quotation about Nixon in

San Clemente did not originate with Mr. Ford, but with James Humes. (Tr. at 100; Pl.Ex. 44 p. 1214) Thus, the use of it in The Nation is not a use of material copyrightable by plaintiffs. The last portion of paragraph 14 quotes arguably copyrightable material. (See Pl.Ex. 1 pp. 237-38)

Paragraph 15:

Buchen, Haig and Henry Kissinger agreed with him. Hartmann was not so sure.

Compared with the far fuller exposition in the manuscript (Pl.Ex. 1 pp. 239-41), this paragraph pared down and reported only facts. In addition, the advice given to President Ford by his aides is a government work originated by persons other than Mr. Ford.

Paragraph 16:

Buchen wanted to condition the pardon on Nixon agreeing to settle the question of who would retain custody and control over the tapes and Presidential papers that might be relevant to various Watergate proceedings, but Ford was reluctant to do that.

This paragraph uses only facts and not expression from the manuscript. The words attributed to Mr. Buchen on page 243 of the manuscript originated with Mr. Buchen and not with Mr. Ford. (Tr. at 100-02; Deft.Ex. D p. 3) Both Mr. Ford's and Mr. Buchen's statements are government works, which plaintiffs may not copyright. (See Pl.Ex. 1 p. 243)

Paragraph 17:

At one point a plan was considered whereby the Presidential materials would be kept in a vault at a Federal facility near San Clemente, but the vault would require two keys to open it. One would be retained by the General Services Administration, the other by Richard Nixon.

This paragraph only reports information as opposed to expression.

(See Pl.Ex. 1 pp. 244-45)

Paragraph 18:

The White House did, however, want Nixon to make a full confession on the occasion of his pardon or, at a minimum, express true contrition. Ford tells of the negotiation with Jack Miller, Nixon's lawyer, over the wording of Nixon's statement. But as Ford reports Miller's response, Nixon was not likely to yield. "His few meetings with his client had shown him that the former President's ability to discuss Watergate objectively was almost nonexistent."

Plaintiffs concede that the second sentence of this paragraph contains no material from the manuscript. (Pl.Ex. 11 p. 11) [Pet. at E-22] Except for the quote at the end, paragraph 18 only reports information from the manuscript. The expression in the manuscript differs significantly from

the narrative of the article. The manuscript reads:

> "Then Phil added: 'Look, I think it's important that there be a statement of true contrition from the former President. The President tells me we can't dictate that statement, but in the interests of both your client and the President, I hope you would persuade your client to develop something that would tell the world, 'yes, he did it, and he's accepting the pardon because he's guilty.'" (Pl.Ex. 1 p. 246) [check against Ford ms.]

In addition, Mr. Buchen's and Mr. Miller's words did not originate with Mr. Ford. Mr. Armbrister testified that Mr. Buchen told him what he himself had said (Tr. at 102-03; Deft. Ex. D p. 3), and that Mr. Becker relayed the words of Mr. Miller. (Tr. at 103; Deft.Ex. D pp. 3-4) Thus the manuscript material did not originate with Mr. Ford and The Nation's use of it, by quotation

or otherwise, did not use material copyrightable by plaintiffs. Finally, Mr. Buchen's statements are works of the United States government. (See Pl.Ex. 1 pp. 245-46)

Paragraph 19:

> The statement they really wanted was never forthcoming. As soon as Ford's emissary arrived in San Clemente, he was confronted with an ultimatum by Ron Zeigler, Nixon's former press secretary. "Let's get one thing straight immediately," Zeigler said. "President Nixon is not issuing any statement whatsoever regarding Watergate, whether Jerry Ford pardons him or not." Zeigler proposed a draft, which was turned down on the ground that "no statement would be better than that." They went through three more drafts before they agreed on the statement Nixon finally made, which stopped far short of a full confession.

Plaintiffs concede that the first sentence of this paragraph does not infringe any copyright. (Pl.Ex. 11 p. 12) [Pet. at E-24] The second

sentence simply conveys information from the manuscript. The quotation from Ron Zeigler did not originate with former President Ford and in fact Mr. Armbrister testified was relayed to him by Mr. Becker. (Tr. at 104; Deft.Ex. D p. 4)

The next sentence -- "Zeigler proposed a draft, which was turned down on the ground that 'no statement would be better than that.'" (Pl.Ex. 1 p. 25) -- reports information contained in the manuscript and then quotes the manuscript's description of Mr. Becker's reaction. The expression repeated in the sentence did not originate with President Ford but rather with Mr. Becker; the remainder conveys

information. (Tr. at 105; see Deft.Ex. D p. 4)

The final sentence of paragraph 19 reports information and copies no expression. (See Pl.Ex. 1 pp. 245-52)

Paragraph 20:

When Ford aide Benton Becker tried to explain to Nixon that acceptance of a pardon was an admission of guilt, he felt the President wasn't really listening. Instead, Nixon wanted to talk about the Washington Redskins. And when Becker left, Nixon pressed on him some cuff links and a tiepin "out of my own jewelry box."

Except for the last small quotation, this paragraph recounts only information. The manuscript itself attributes the statement to Mr. Nixon. Moreover, Mr. Armbrister testified that it was Mr. Becker who supplied the two quotations. (Tr. at 105-06; Deft.Ex. D p. 4) (See Pl.Ex. 1 pp. 253-54)

Paragraph 21:

Ultimately, Ford sums up the philosophy underlying his decision as one he picked up as a student at Yale Law School many years before. "I learned that public policy often took precedence over a rule of law. Although I respected the tenet that no man should be above the law, public policy demanded that I put Nixon -- and Watergate -- behind us as quickly as possible."

The first sentence of this paragraph is editorial material unrelated to any expression in the manuscript. Plaintiffs concede that the word "Ultimately" is not at issue in this case. (Pl.Ex. 11 p. 3) [Pet. at 26] The material concerning Mr. Ford's philosophy was first voiced by Mr. James Humes in an interview with Mr. Ford and Mr. Armbrister and is thus not original to President Ford. (Pl.Ex. 44 pp. 2091-92)

Paragraph 22:

Later, when Ford learned that Nixon's phlebitis had acted up and his health was seriously impaired, he debated whether to pay the ailing former president a visit. "If I made the trip it would remind everybody of Watergate and the pardon. If I didn't, people would say I lacked compassion." Ford went:

> "He was stretched out flat on his back. There were tubes in his nose and mouth, and wires led from his arms, chest and legs to machines with orange lights that blinked on and off. His face was ashen, and I thought I had never seen anyone closer to death."

The first sentence of this paragraph only conveys the information recited in the manuscript. The quotations are from arguably copyrightable material. (See Pl.Ex. 1 pp. 298-99)

Paragraph 23:

The manuscript made available to The Nation includes many references to Henry Kissinger and other personalities who played a major role during the Ford years.

Plaintiffs concede this paragraph makes no use of the manuscript. (Pl. Ex. 11 p. 15) [Pet. at E-30]

Paragraph 24:

On Kissinger. Immediately after being informed by Nixon of his intention to resign, Ford returned to the Executive Office Building and phoned Henry Kissinger to let him know how he felt. "Henry," he said, "I need you. The country needs you. I want you to stay. I'll do everything I can to work with you."

The first sentence* condenses the material from the manuscript into the facts and takes no expression. The second sentence is a statement made by a government official in the course of his duties and, therefore, a work of

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* Plaintiffs concede that the heading of this paragraph, "On Kissinger" makes no use of material from the manuscript. (Pl.Ex. 11 p. 15) [Pet. at E-30]

the United States government. (See Pl. Ex. 1 pp. 45-46)

Paragraph 25:

"Sir," Kissinger replied, "it is my job to get along with you and not yours to get along with me."

This paragraph is also a work of the United States government; moreover, the expression originated with Mr. Kissinger and not Mr. Ford. (Deft.Ex. D p. 1) (See Pl.Ex. 1 p. 46)

Paragraph 26:

"We'll get along," Ford said. "I know we'll get along." Referring to Kissinger's joint jobs as Secretary of State and National Security Adviser to the President, Ford said, "I don't want to make any change. I think it's worked out well, so let's keep it that way."

This paragraph similarly consists of government works or only reports information. In addition, the statement attributed to former President Ford,

"We'll get along . . . I know we'll get along" in fact came from Mr. Kissinger. (Deft.Ex. D p. 7) (See Pl.Ex. 1 p. 46)

Paragraph 27:

Later Ford did make the change and relieved Kissinger of his responsibilities as National Security Adviser at the same time that he fired James Schlesinger as Secretary of Defense. Shortly thereafter, he reports, Kissinger presented him with a "draft" letter of resignation, which he said Ford could call upon at will if he felt he needed it to quiet dissent from conservatives who objected to Kissinger's role in the firing of Schlesinger.

This paragraph reports information contained in widely separated pages of the manuscript, (Pl.Ex. 1 pp. 494, 537) and repeats none of Mr. Ford's expression. Moreover, President Ford's statements to Mr. Kissinger and Mr. Rumsfeld and Mr. Kissinger's remarks recounted in the manuscript are

statements of public officials, which are works of the United States government. In addition, Mr. Kissinger's remarks did not originate with Mr. Ford and are not copyrightable by plaintiffs. (Pl.Ex. 1 pp. 491-92, 494-95, 436-37)

Paragraph 28:

On John Connally. When Ford was informed that Nixon wanted him to replace Agnew, he told the President he had "no ambition to hold office after January 1977." Nixon replied that that was good since his own choice for his running mate in 1976 was John Connally. "He'd be excellent," observed Nixon. Ford says he had "no problem with that."

The quotation in the first sentence of paragraph 28* derives from a

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* Plaintiffs concede that the heading of this paragraph, "On John Connally", makes no use of material from the manuscript. (Pl.Ex. 11 p. 16) [Pet. at E-32]

discussion between then Congressman Ford and President Nixon, and thus is a work of the United States government. Moreover, Mr. Nixon's statement to Mr. Ford is not original to Mr. Ford. The second sentence, also derived from government works material and based on Mr. Nixon's statement not original to Mr. Ford, has no quotations and only reports information. The third sentence is also derived from government material and is a quotation of former President Nixon's words not original to President Ford. The final sentence, similarly derived from government material, is in fact a paraphrase of the manuscript despite the presence of quotation marks in the article: the manuscript reads, "'That's no problem as far as I'm

concerned,' I said" (Pl.Ex. 11 p. 156) [Pet. at E-33]; the article reads, "Ford says he had 'no problem with that.'" (See Pl.Ex. 1 pp. 155-56)

Paragraph 29:

On the Decision to Run Again. Ford was, he tells us, so sincere in his intention not to run again that he thought he would announce it and enhance his credibility in the country and the Congress, as well as keep the promise he had made to his wife, Betty.

This paragraph reports only information and not expression.*

(See Pl.Ex. 1 p. 216)

Paragraph 30:

Kissinger talked him out of it. "You can't do that. It would be

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* Plaintiffs concede that the heading of this paragraph, "On the Decision to Run Again," uses no material from the manuscript. (Pl.Ex. 11 p. 17) [Pet. at E-34]

disastrous from a foreign policy point of view. For the next two and a half years foreign governments would know that they were dealing with a lame-duck President. All our initiatives would be dead in the water, and I wouldn't be able to implement your foreign policy. It would probably have the same consequences in dealing with the Congress on domestic issues. You can't reassert the authority of the Presidency if you leave yourself hanging out on a dead limb. You've got to be an affirmative President."

The first sentence only reports information. The quotation from Mr. Kissinger is uncopyrightable by Mr. Ford both as the expression of a third person and as the statement of a work of the United States government. (See Pl.Ex. 1 pp. 216-17)

Paragraph 31:

On David Kennerly, the White House photographer. Schlesinger was arguing with Kissinger and Ford over the appropriate response to the seizure of the Mayaguez. At issue was whether airstrikes against the Cambodians were desirable; Schlesinger was opposed

to bombings. Following a lull in the conversation, Ford reports, up spoke the 30-year-old White House photographer, David Kennerly, who had been taking pictures for the last hour.

This paragraph only reports facts from the manuscript.* Moreover, the underlying material in the manuscript is an account of a discussion about the Mayaguez crisis and thus is uncopyrightable as statements by government officials and as others' expression.

(See Pl.Ex. 1 pp. 414-15)

Paragraph 32:

"Has anyone considered," Kennerly asked, "that this might be the act of a local Cambodian commander who has just taken it into his own hands to stop any ship that comes by?" Nobody, apparently had considered it, but

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* Plaintiffs concede that the heading, "On David Kennerly, the White House photographer," uses no material from the manuscript. (Pl.Ex. 11 p. 18) [Pet. at E-36]

following several seconds of silence, Ford tells us, the view carried the day. "Massive airstrikes would constitute overkill," Ford decided. "It would be far better to have Navy jets from the Coral Sea make surgical strikes against specific targets."

The first sentence is not original to Mr. Ford; Mr. Armbrister testified also that this line was conveyed to him by Mr. Kennerly. (Tr. at 108)

The second sentence consists of information from the book and editorial material by The Nation: "the view carried the day." The quotations contained in the rest of the paragraph are arguably copyrightable material. (See Pl.Ex. 1 pp. 415-17)

Paragraph 33:

On Nixon's Character. Nixon's flaw, according to Ford, was "pride." "A terribly proud man," writes Ford, "he detested weakness in other people. I'd often heard him speak disparagingly of those whom he felt to be soft and

expedient. (Curiously, he didn't feel that the press was weak. Reporters, he sensed, were his adversaries. He knew they didn't like him, and he responded with reciprocal disdain.)"

Except for the connectives supplied by The Nation,* this paragraph consists of arguably copyrightable material. (See Pl.Ex. 1 pp. 52-53)

Paragraph 34:

Nixon felt disdain for the Democratic leadership of the House, whom he also regarded as weak. According to Ford, "His pride and personal contempt for weakness had overcome his ability to tell the difference between right and wrong," all of which leads Ford to to wonder whether Nixon had known in advance about Watergate.

The first sentence reports information from the manuscript. The quotation in the second sentence is of arguably

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* Plaintiffs concede that the heading, "On Nixon's Character" uses no material from the manuscript. (Pl.Ex. 11 p. 19) [Pet. at E-38]

copyrightable material; the latter part of that sentence only reports information from the manuscript. (See Pl. Ex. 1 p. 54)

Paragraph 35:

On hearing Nixon's resignation speech, which Ford felt lacked an adequate plea for forgiveness, he was persuaded that "Nixon was out of touch with reality."

Except for the quotation at the end of this sentence, arguably copyrightable material, the paragraph reports only facts and not expression. (See Pl.Ex. 1 pp. 55-57)

Paragraphs 36 - 38:

In February of last year, when The Washington Post obtained and printed advance excerpts from H.R. Haldeman's memoir, The Ends of Power, on the eve of its publication by Times Books, The New York Times called The Post's feat "a second-rate burglary."

The Post disagreed, claiming that its coup represented "first-rate

enterprise" and arguing that it had burglarized nothing, that publication of the Haldeman memoir came under the Fair Comment doctrine long recognized by the courts, and that "There is a fundamental journalistic principle here -- a First Amendment principle that was central to the Pentagon Papers case."

In the issue of The Nation dated May 5, 1979, our special Spring Books number, we will discuss some of the ethical problems raised by the issue of disclosure.

Plaintiffs concede that these paragraphs are not at issue in this lawsuit. (Pl.Ex. 11 p. 20) [Pet. at E-40]

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———: INFORMATION

———: DERIVED FROM MATERIAL THAT IS OTHERS' EXPRESSIONS

-: DERIVED FROM MATERIAL THAT IS GOVERNMENT WORKS

———: DERIVED FROM MATERIAL THAT IS PUBLIC DOMAIN

———: ARGUABLY COPYRIGHTABLE

———: PLAINTIFFS CONCEDE NOT AT ISSUE

Paragraph 1:

In his memoirs, A Time to Heal, which Harper & Row will publish in late May or early June, former President Gerald R. Ford says that the idea of giving a blanket pardon to Richard M. Nixon was raised before Nixon resigned from the Presidency by Gen. Alexander Haig, who was then the White House chief of staff.

Paragraph 2:

Ford also writes that, but for a misunderstanding, he might have selected Ronald Reagan as his 1976 running mate, that Washington lawyer Edward Bennett Williams, a Democrat, was his choice for head of the Central Intelligence Agency, that Nixon was the one who first proposed Nelson Rockefeller for Vice President, and that he regretted his "cowardice" in allowing Rockefeller to remove himself from Vice Presidential contention. Ford also describes his often prickly relations with Henry Kissinger.

Paragraph 3:

The Nation obtained a 655-page typescript before publication. Advance excerpts from the book will appear in

Time in mid-April and in The Reader's Digest thereafter. Although the initial print order has not been decided, the figure is tentatively set at 50,000; it could change, depending upon the public reaction to the serialization.

Paragraph 4:

Ford's account of the Nixon pardon contains significant new detail on the negotiations and considerations that surrounded it. According to Ford's version, the subject was first broached to him by General Haig on August 1, 1974, a week before Nixon resigned. General Haig revealed that the newly transcribed White House tapes were the equivalent of the "smoking gun" and that Ford should prepare himself to become President.

Paragraph 5:

Ford was deeply hurt by Haig's revelation: "Over the past several months Nixon had repeatedly assured me that he was not involved in Watergate, that the evidence would prove his innocence, that the matter would fade from view." Ford had believed him, but he let Haig explain the President's alternatives.

Paragraph 6:

He could "ride it out" or he could resign, Haig said. He then listed the different ways Nixon might resign and concluded by pointing out that Nixon could agree to leave in return for an agreement that the new President, Ford, would pardon him. Although Ford said it would be improper for him to make any

recommendation, he basically agreed with Haig's assessment and adds, "Because of his references to the pardon authority, I did ask Haig about the extent of a President's pardon power."

Paragraph 7:

"It's my understanding from a White House lawyer," Haig replied, "that a President does have authority to grant a pardon even before criminal action has been taken against an individual."

Paragraph 8:

But because Ford had neglected to tell Haig he thought the idea of a resignation conditioned on a pardon was improper, his press aide, Bob Hartmann, suggested that Haig might well have returned to the White House and told President Nixon that he had mentioned

the idea and Ford seemed comfortable with it. "Silence implies assent."

Paragraph 9:

Ford then consulted with White House special counsel James St. Clair, who had no advice one way or the other on the matter more than pointing out that he was not the lawyer who had given Haig the opinion on the pardon. Ford also discussed the matter with Jack Marsh, who felt that the mention of a pardon in this context was a "time bomb," and with Bryce Harlow, who had served six Presidents and who agreed that the mere mention of a pardon "could cause a lot of trouble."

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called Haig and read him a written statement: "I want you to understand that I have no intention of recommending what the President should do about resigning or not resigning and that nothing we talked about yesterday afternoon should be given any consideration in whatever decision the President may wish to make."

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Despite what Haig had told him about the "smoking gun" tapes, Ford told a Jackson, Mich., luncheon audience later in the day that the President was not guilty of an impeachable offense. "Had I said otherwise at that moment," he writes, "the whole house of cards might have collapsed."

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The precipitating factor in his decision was a series of secret meetings his general counsel, Phil Buchen, held with Watergate Special Prosecutor Leon Jaworski in the Jefferson Hotel, where they were both staying at the time. Ford attributes Jaworski with providing some "crucial" information -- i.e., that Nixon was under investigation in ten separate areas, and that the court

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"If you decide to recommend indictment I think it is fair and proper to notify Jack Miller and the White House sufficiently in advance so that pardon action could be taken before the indictment." He went on to say:

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Ultimately, Ford sums up the philosophy underlying his decision as one he picked up as a student at Yale Law School many years before. "I learned that public policy often took precedence over a rule of law. Although I respected the tenet that no man should be above the law, public policy

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"Sir," Kissinger replied, "it is my job to get along with you and not yours to get along with me."

Paragraph 26:

"We'll get along," Ford said. "I know we'll get along." Referring to Kissinger's joint jobs as Secretary of State and National Security Adviser to the President, Ford said, "I don't want to make any change. I think it's worked out well, so let's keep it that way."

Paragraph 27:

Later Ford did make the change and relieved Kissinger of his responsibilities as National Security Adviser at the same time that he fired James Schlesinger as Secretary of

Defense. Shortly thereafter, he reports, Kissinger presented him with a "draft" letter of resignation, which he said Ford could call upon at will if he felt he needed it to quiet dissent from conservatives who objected to Kissinger's role in the firing of Schlesinger.

Paragraph 28:

On John Connally. When Ford was informed that Nixon wanted him to replace Agnew, he told the President he had "no ambition to hold office after January 1977." Nixon replied that that was good since his own choice for his running mate in 1976 was John Connally. "He'd be excellent," observed Nixon. Ford says he had "no problem with that."

Paragraph 29:

On the Decision to Run Again. Ford was, he tells us, so sincere in his intention not to run again that he thought he would announce it and enhance his credibility in the country and the Congress, as well as keep the promise he had made to his wife, Betty.

Paragraph 30:

Kissinger talked him out of it. "You can't do that. It would be disastrous from a foreign policy point of view. For the next two and a half years foreign governments would know that they were dealing with a lame-duck President. All our initiatives would be dead in the water, and I wouldn't be able to implement your foreign

policy. It would probably have the same consequences in dealing with the Congress on domestic issues. You can't reassert the authority of the Presidency if you leave yourself hanging out on a dead limb. You've got to be an affirmative President."

Paragraph 31:

On David Kennerly, the White House photographer. Schlesinger was arguing with Kissinger and Ford over the appropriate response to the seizure of the Mayaguez. At issue was whether airstrikes against the Cambodians were desirable; Schlesinger was opposed to bombings. Following a lull in the conversation, Ford reports, up spoke the 30-year-old White House

photographer, David Kennerly, who had been taking pictures for the last hour.

Paragraph 32:

"Has anyone considered," Kennerly asked, "that this might be the act of a local Cambodian commander who has just taken it into his own hands to stop any ship that comes by?" Nobody, apparently, had considered it, but following several seconds of silence, Ford tells us, the view carried the day. "Massive airstrikes would constitute overkill," Ford decided. "It would be far better to have Navy jets from the Coral Sea make surgical strikes against specific targets."

Paragraph 33:

On Nixon's Character. Nixon's flaw, according to Ford, was "pride,"

"A terribly proud man," writes Ford, "he detested weakness in other people. I'd often heard him speak disparagingly of those whom he felt to be soft and expedient. (Curiously, he didn't feel that the press was weak. Reporters, he sensed, were his adversaries. He knew they didn't like him, and he responded with reciprocal disdain.)"

Paragraph 34:

Nixon felt disdain for the Democratic leadership of the House, whom he also regarded as weak. According to Ford, "His pride and personal contempt for weakness had overcome his ability to tell the difference between right and wrong," all of which leads Ford to wonder whether Nixon had known in advance about Watergate.

Paragraph 35:

On hearing Nixon's resignation speech, which Ford felt lacked an adequate plea for forgiveness, he was persuaded that "Nixon was out of touch with reality."

Paragraph 36:

In February of last year, when The Washington Post obtained and printed advance excerpts from H.R. Haldeman's memoir, The Ends of Power, on the eve of its publication by Times Books, The New York Times called The Post's feat "a second-rate burglary."

Paragraph 37:

The Post disagreed, claiming that its coup represented "first-rate enterprise" and arguing that it had burglarized nothing, that publication of

the Haldeman memoir came under the Fair Comment doctrine long recognized by the courts, and that "There is a fundamental journalistic principle here -- a First Amendment principle that was central to the Pentagon Papers case."

Paragraph 38:

In the issue of The Nation dated May 5, 1979, our special Spring Books number, we will discuss some of the ethical problems raised by the issue of disclosure.

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ADDENDUM B TO DEFENDANTS'
POST-TRIAL MEMORANDUM

Comparison of The Nation Article
With the Manuscript

Paragraph 1

In his memoirs, A Time to Heal, which Harper & Row will publish in late May or early June, former President Gerald R. Ford says that the idea of giving a blanket pardon to Richard M. Nixon was raised before Nixon resigned from the Presidency by Gen. Alexander Haig, who was then the White House chief of staff.

Manuscript

[none]

Paragraph 2

Ford also writes that, but for a misunderstanding, he might have selected Ronald Reagan as his 1976 running mate, that Washington lawyer Edward Bennett Williams, a Democrat, was his choice for head of the Central Intelligence Agency, that Nixon was the one who first proposed Nelson Rockefeller for Vice President, and that he regretted his "cowardice" in allowing Rockefeller to remove himself from Vice Presidential contention. Ford also describes his often prickly relations with Henry Kissinger.

Manuscript

About a month before the convention, my aides had met with Reagan's representatives to discuss the need for party unity. And they had reached an agreement. At the end of the Presidential balloting, the winner would go to the loser's hotel suite and congratulate his opponent for waging a fine campaign. Together, they would appear at a press conference and urge all Republicans to put aside their differences and rally behind the ticket. That was the only way we could leave Kansas City with a hope of victory. When it appeared that I was going to win, Sears contacted Cheney and refined the scenario. He insisted on two conditions. The first was that I had to see Reagan alone; there could be no aides from either camp in the room. Secondly, under no circumstances should I offer him the nomination to be Vice President. Reagan had said all along that he wasn't interested in the job. He had meant what he said. If I tried to talk him out of it, he would have to turn me down, and that would be embarrassing because it would appear that he was refusing to help the GOP. When Cheney relayed those conditions to me, I agreed to go along with them. I would need Reagan's assistance in the fall campaign. It would be stupid to anger him or his followers at this moment.

Later I was told that just before my arrival at the Californian's hotel, one of his closest advisers, businessman Justin Dart, had urged him to say yes if I asked him to be my running mate. Regardless of anything he'd said before, Dart had insisted, it was his patriotic duty to accept the number two post. Finally, according to Dart, Reagan had agreed. But at the time, no one mentioned this new development to me. Had I been aware of the Dart-Reagan conversation, would I have chosen him? I can't say for sure -- I thought his challenge had been divisive, and that it would probably hurt the party in the fall campaign; additionally, I resented some of the things that he'd been saying about me and my Administration's policies -- but I certainly would have considered him. (Pl. Ex. 1 pp. 607-08)

* * *

Next I thought about other changes that I wanted to make. Bill Colby had been director of the CIA at a traumatic period in the agency's history. He had gone through hell and, in my opinion, done a splendid job. In the fall of 1975, many people felt that I was angry at him for disclosing too much about CIA activities in his appearances before Congressional committees. That was

not the case. He was on a hot seat before one committee after another. I supported his decision to tell the truth about past agency misdeeds even though both of us recognized that his testimony would be embarrassing. Colby was smart; he possessed both integrity and guts, and I liked and respected him very much. Yet my personal regard for him did not alter my conviction that the agency needed a change at the top. Colby had completed his exhaustive Capitol Hill testimony about past CIA activities. Drawing essentially on the excellent recommendations of the Rockefeller commission, we had proceeded with plans to reorganize and reform the agency. If that reorganization was to have the substance as well as the image of a significant change, we had to appoint a new man to preside over it.

Washington attorney Edward Bennett Williams was my first choice. He was a brilliant lawyer, a savvy Washingtonian with an interest in intelligence matters and a Democrat, which meant that he'd probably win Senate confirmation easily. (Pl. Ex. 1 pp. 490-91)

* * *

Ten minutes later, I entered the White House. I stopped at Haig's office first. His eyes told me all I

needed to know. I walked into the Oval Office alone. Nixon was sitting behind his desk, but he stood up as soon as I entered the room. We shook hands; he said, "Sit down," and I took the chair to his right. (Pl. Ex. 1 p. 42)

* * *

Then we talked about who my Vice President would be. He suggested that Nelson A. Rockefeller, the four-term governor of New York, would be a wise selection. He didn't identify anyone else by name. "There are a number of good people," he said. "It's your choice. I won't be talking to you again, but you'll want somebody who will add stature to the Administration, somebody who will generate national as well as international confidence." (Pl. Ex. 1 pp. 44-45)

* * *

Now as Rockefeller and I talked on October 28 we discussed the growing strength of the GOP's right wing. Perhaps, he said, the best thing he could do would be to withdraw from consideration as my running mate. He would rather do that voluntarily than as the direct result of pressure from conservatives. "Mr. President," he said, "I'll do anything you want me to do. I'll be on the ticket or I'll be off the ticket. You just say the word."

As we talked, I didn't try to gloss over the fact that conservative opposition to him might jeopardize my own nomination. "There are serious problems," I said, "and to be brutally frank, some of these difficulties might be eliminated if you were to indicate that you didn't want to be on the ticket in 1976. I'm not asking you to do that, I'm just stating the facts."

"I understand," he said. "Well, it's probably better that I withdraw. If I take myself out of the picture, that will clear the air. I'll give you a letter saying that I don't want to be considered as a Vice Presidential nominee."

I knew how he felt, and that bothered me. He had suffered so many setbacks in his political life, and this was one more.

"You've been very loyal," I said. "We've had a fine relationship, and I hope that despite this, that loyalty and friendship will endure."

Nelson said that it would. As I walked him to the door, I put my arm around his shoulder. I was grateful for his expression of unselfishness, his willingness to do what was in the best interests of the party and the country -- and me. At the same time, I was very sad, because I had failed

to express the depth of my feeling for him. Inwardly, I was angry with myself for showing cowardice in not saying to the ultra-conservatives, "It's going to be Ford and Rockefeller, whatever the consequences." (Pl. Ex. 1 pp. 495-96)

Paragraph 3

The Nation obtained a 655-page typescript before publication. Advance excerpts from the book will appear in Time in mid-April and in The Reader's Digest thereafter. Although the initial print order has not been decided, the figure is tentatively set at 50,000; it could change, depending upon the public reaction to the serialization.

Manuscript

[none]

Paragraph 4

Ford's account of the Nixon pardon contains significant new detail on the negotiations and considerations that surrounded it. According to Ford's version, the subject was first broached to him by General Haig on August 1, 1974, a week before Nixon resigned. General Haig revealed that the newly transcribed White House tapes were the equivalent of the "smoking gun" and that Ford should prepare himself to become President.

Manuscript

Part I

"Uncertain Days"

"I know there is a God. I see the storm coming, and I know His hand is in it. If He has a place for me, and I think He has, I believe I am ready; with God's help I shall not fail."

--Abraham Lincoln to his friend
Newton Bateman before the
Presidential election of 1860

Shortly before 9 o'clock on the warm, cloudy morning of August 1, 1974, I received a telephone call from General Alexander M. Haig, Jr. For the past 15 months -- ever since the resignations of H.R. Haldeman and John Ehrlichman -- Haig had been serving as White House Chief of Staff, and he had done a magnificent job in an almost impossible situation.

"Mr. Vice President," he said, "it's urgent that I see you as soon as possible."

I could tell from the tone of his voice that something very important was happening and that he didn't want to discuss it on the telephone. "Well, sure," I replied. "Come on over now. We have some meetings on the schedule, but we can push them back."

Fifteen minutes later, Haig arrived at my office on the second floor of the Executive Office Building. Robert Hartmann, the brusque former newspaperman who was serving as my Chief of Staff, had been talking with me about routine-business, and I'd asked him to stay for the session with Haig. This, too, was routine. Whenever I had a meeting on a matter of some importance, the staff always made sure that a witness was there. But Haig did not know Hartmann well. He seemed surprised by his presence, and I had the impression that he didn't feel he could be as forthright as he might normally have been. Still, what he did say was worrisome enough.

Eight days earlier, on July 24, the Supreme Court had ruled that President Richard M. Nixon had to turn over to U.S. District Court Judge John Sirica the tape recordings of sixty-four conversations that had been taped in the President's offices. The Court felt that they might contain evidence for the pending cover-up trial of six of Nixon's former aides. The President had already turned over transcripts of twenty of those tapes; other tapes were scheduled to be delivered to Sirica on Monday, August 5. And those others were the ones that bothered Haig.

"I want to alert you that things are deteriorating," he said. "The whole ball game may be over. You'd better start thinking about a change in your life. I can't tell you what's going to happen, but I have to tell you what I know."

The new tapes, he said, contained evidence that would contradict Nixon's version of events in the Watergate scandal. The evidence would prove that Nixon knew about the cover-up six days after the break-in at the Democratic National Committee headquarters and that he'd been deceiving the American people ever since. He hadn't seen the evidence himself, Haig said, but he'd been told about it by people who had. They had explained that it contained the so-called smoking gun, and he felt sure that they were telling the truth. (Pl. Ex. 1 pp. 1-3)

* * *

Shortly after noon that day, I drove to Capitol Hill. No sooner had I entered my office off the Senate floor than Haig telephoned again. He wanted another meeting as soon as possible, and this time he didn't want Hartmann there.

When Haig appeared at three-thirty that afternoon, he looked even more beaten and harrassed than he had

earlier. Since our morning meeting, he had either read the transcripts or heard them discussed in great detail. The tapes made clear that Nixon knew the whole story on June 23, 1972. And when that evidence became public, Nixon's case would disintegrate. In moments of stress, Haig proceeds very deliberately, choosing his words with great care. Now he came to the point: "Are you ready, Mr. Vice President, to assume the Presidency in a short period of time?" (Pl. Ex. 1 p. 4)

Paragraph 5

Ford was deeply hurt by Haig's revelation: "Over the past several months Nixon had repeatedly assured me that he was not involved in Watergate, that the evidence would prove his innocence, that the matter would fade from view." Ford had believed him, but he let Haig explain the President's alternatives.

Manuscript

Throughout my political life, I always believed what I was told. I was truthful to others; I expected others to be truthful with me. Repeatedly over the past several months, Nixon had assured me that he was not involved in Watergate, that the evidence would prove his innocence, that the matter would fade

from view. He had said much the same thing to his Cabinet and staff, to his family and to the American people. I had chosen to believe him, and I had tried to give him the benefit of every doubt. One reason for my support was our long association together. We had been friends for twenty-five years. I had campaigned for him; he had campaigned for me, and there had never been a time when I felt he wasn't telling me the truth. A second reason, of course, was the office I held. I simply <u>had</u> to support him. If I did anything else, people would charge that I was undercutting him in order to acquire the Presidency myself.

My staff saw what was coming much earlier than I did. On several occasions during that spring and summer, Hartmann or Jack Marsh, a former Congressman from Virginia, who was one of my closest aides, came into my office and said, "Well, it looks closer and closer, your becoming President." And I always brushed it off, partly because I didn't want to believe it and partly because I didn't want to say the slightest thing to anyone that might be construed as an effort to undermine Nixon. Indeed, until that moment, I had agreed with St. Clair and others that as a matter of law, the President was not guilty of an impeachable offense. Bad judgment, yes, but not an impeachable offense.

And now this. I was angry that Nixon hadn't told me the truth. (Pl. Ex. 1 p. 7)

<u>Paragraph 6</u>

He could "ride it out" or he could resign, Haig said. He then listed the different ways Nixon might resign and concluded by pointing out that Nixon could agree to leave in return for an agreement that the new President, Ford, would pardon him. Although Ford said it would be improper for him to make any recommendation, he basically agreed with Haig's assessment and adds, "Because of his references to the pardon authority, I did ask Haig about the extent of a President's pardon power."

<u>Paragraph 7</u>

"It's my understanding from a White House lawyer," Haig replied, "that a President does have authority to grant a pardon even before criminal action has been taken against an individual."

<u>Manuscript</u>

"If it happens, Al, I am prepared," I said. Our conversation that day had an unusual formality, both of us aware that we were speaking not only as friends but also for the record book.

"I can't tell you what's going to happen in the next forty-eight hours," he went on. "I just don't know what the President is going to do." Haig said he had discussed the new evidence with Nixon the afternoon before, and Nixon had brushed it off by saying that it was "manageable." Everyone else who knew about it disagreed. Carefully, Haig laid out the options that the "knowledgeable people" on the White House staff had agreed were still available to the President. The first was that he could try to "ride it out" by letting impeachment take its natural course through the House and the Senate trial, fighting against conviction all the way. His second option was to resign.

Here the number of alternatives increased. Under provisions of the 25th Amendment to the Constitution, he could step aside temporarily. He could delay his resignation until further along in the impeachment process. He could try to settle for a censure vote in the Congress. He could pardon himself and everyone else involved in Watergate and then resign. Finally, Haig said that according to some on Nixon's White House staff, Nixon could agree to leave in return for an agreement that the new President -- Gerald Ford -- would pardon him. Haig emphasized that these weren't <u>his</u> suggestions.

He didn't identify the staff members and he made it very clear that he wasn't recommending any one option over another. What he wanted to know was whether or not my overall assessment of the situation agreed with his.

I had no doubts about his basic assumptions. If Nixon tried to "ride it out," he'd be impeached in the House, and the odds were overwhelming that he'd be convicted in the Senate. These new tapes would cause a groundswell of demands for his immediate resignation. But that's where Nixon's peculiar personality came into play. He was not one to quit. If someone went to him and said, "You must resign tomorrow," that would inevitably tilt his decision to stay and fight it through. Pressure couldn't be applied directly.

Haig agreed completely with that. Next he asked if I had any suggestions as to courses of action for the President. I didn't think it would be proper for me to make any recommendations at all, and I told him so. Because of his references to pardon authority, I did ask Haig about the extent of a President's pardon power.

"It's my understanding from a White House lawyer," Haig replied, "that a President does have authority

to grant a pardon even before criminal action has been taken against an individual." He didn't name the lawyer. Nor did he say whether or not that authority existed before the individual had been indicted. It was simply a general interpretation. (Pl. Ex. 1 pp. 4-6)

Paragraph 8

But because Ford had neglected to tell Haig he thought the idea of a resignation conditioned on a pardon was improper, his press aide, Bob Hartmann, suggested that Haig might well have returned to the White House and told President Nixon that he had mentioned the idea and Ford seemed comfortable with it. "Silence implies assent."

Manuscript

After several moments, Hartmann interrupted my reverie. I asked him to schedule an appointment with St. Clair first thing in the morning; then I told him about my latest conversation with Haig. As I repeated the options that Haig had listed for me, warning bells seemed to go off inside his head. "That's why you should have had a witness there," he said.

"What do you mean?"

"That last option Haig mentioned, that Nixon resign in return for an agreement that he receive a pardon from the new President. I don't like that at all."

"But, Bob," I replied, "Al wasn't suggesting that. It was just one of the ideas that he said were being kicked around by people at the White House."

"I know, I know. But Haig didn't come over here to go away empty-handed. And he didn't discuss this delicate matter without Nixon's knowing about it. And he mentioned the pardon option, and you sat there listening to him. Well, silence implies assent. He probably went back to the White House and told Nixon that he'd mentioned the idea and that you weren't uncomfortable with it. It was extremely improper for him to bring the subject up."

That reaction was typical of Bob. Because I'm not by nature suspicious of people or their motives, I thought it would be wise to have someone on my staff who was. And Bob was suspicious of everyone. Over the years that Hartmann characteristic had saved me from many pitfalls. This time, however, I thought he was overreacting, making a mountain out of a molehill, and I told him so.

"Well," he replied, "I think you ought to get Jack Marsh's judgment on this."

I looked at my watch. It was five-thirty. Betty, I knew was waiting for me in the limousine outside. The options discussion would have to be put off. "All right," I told Bob. "I'll talk to Jack, but I don't have time now. I've got to go." (Pl. Ex. 1 pp. 8-9)

Paragraph 9

Ford then consulted with White House special counsel James St. Clair, who had no advice one way or the other on the matter more than pointing out that he was not the lawyer who had given Haig the opinion on the pardon. Ford also discussed the matter with Jack Marsh, who felt that the mention of a pardon in this context was a "time bomb," and with Bryce Harlow, who had served six Presidents and who agreed that the mere mention of a pardon "could cause a lot of trouble."

Paragraph 10

As a result of these various conversations, Vice President Ford called Haig and read him a written statement: "I want you to understand that I have no intention of recommending what the President should do about resigning or not resigning and that

nothing we talked about yesterday afternoon should be given any consideration in whatever decision the President may wish to make."

Manuscript

Shortly after eight o'clock the next morning, I met with James St. Clair, the Boston attorney who had been handling Nixon's impeachment defense for the past seven months. A soft-spoken, rather handsome man, St. Clair had a retiring, almost self-effacing manner that belied a first-rate legal mind.

Until our meeting that morning, I had assumed that St. Clair had been given access to all material relevant to the Watergate affair. Yet, it was obvious to me that the three June 23 tapes of Nixon's conversations with Haldeman had caught him by surprise. He was shocked by them. "Until I found out about those tapes," he said, speaking very deliberately, "I was absolutely convinced that the President was not guilty of an impeachable offense, and I was preparing my defense based on that belief."

"What's your assessment now?"

"Probably the same as yours," he said. "Unquestionably, this will lead the House to impeach the President.

It'll lead the Senate to convict him. The only question now is: What does he do? Resign or fight it through?"

Neither one of us could know his answer then. Quickly I asked St. Clair, "Do you know of any other new or damaging evidence besides what's on the June 23 tapes?"

"No," he replied.

Then I told him about the options that Haig has mentioned to me the afternoon before. St. Clair listened quietly, commenting only that he had not been the source of any White House staff opinion about a President's power to issue pardons.

No sooner had St. Clair left than I called in Marsh. I briefed Jack on everything that had occurred in the past twenty-four hours. He seemed just as stunned by the news as I had been. That is not to say that he registered much emotion. Anyone who can make thirty-eight parachute jumps while serving as a Congressman has to be fairly calm and unflappable. And Jack was certainly that. But he was also a man of incredibly good judgment. He agreed with Bob that the mere mention of the pardon option constituted a potential time bomb for me. I explained that Haig was not suggesting a deal, that these

options hadn't even originated with him, that I had said nothing to signal approval or disapproval of any of them. But like Hartmann, Marsh was adamant. "If you don't believe us," Jack said, "talk to someone else whose advice you value." I agreed to do that.

The question then became: To whom could I turn? Almost instantly, Bryce Harlow came to mind. A short, solemnfaced Oklahoman who had already served six Presidents, he was a man of total integrity. Possessed of infinite tact -- in 1972, when the late House Majority Leader Hale Boggs and I traveled to the People's Republic of China, Harlow was the man I asked to bridge the gap between our staffs -- he also had more common sense and political perception than anyone I knew. I was sure I could rely upon him totally, and I told Hartmann to arrange a meeting as soon as possible. (Pl. Ex. 1 pp. 14-16)

* * *

My schedule that afternoon was crowded as usual: an interview with James Reston of the New York Times, a session with representatives of the National League of Families of American Prisoners and Missing in Southeast Asia, individual meetings with Deputy Assistant Secretary of Defense Roger Shields, Office

Management and Budget Director Roy Ash and Secretary of the Treasury William Simon. Then there was that all-important get-together with Bryce Harlow. He came to my office late in the afternoon and, with Hartmann present, I told him everything I knew. He listened impassively, his expression betraying no emotion at all. Only after I had finished did he let me know in no uncertain terms that he agreed with Bob and Jack, that the mere mention of the pardon option could cause a lot of trouble in the days ahead.

We agreed that the only thing I could do would be to call Haig in the presence of witnesses and button this thing down. Minutes later, Haig was on the line. I had written out in longhand what I wanted to say to him, and I read it slowly so that there could be no ambiguities. "I want you to understand," I said, "that I have no intention of recommending what the President should do about resigning or not resigning and that nothing we talked about yesterday afternoon should be given any consideration in whatever decision the President may wish to make." (Pl. Ex. 1 pp. 18-19)

Paragraph 11

Despite what Haig had told him about the "smoking gun" tapes, Ford

told a Jackson, Mich., luncheon audience later in the day that the President was not guilty of an impeachable offense. "Had I said otherwise at that moment," he writes, "the whole house of cards might have collapsed."

Manuscript

Shortly after ten that morning, Air Force II touched down at the Golden Triangle Regional Airport in Starkville, Mississippi. I spoke at a rally there for our House candidate, Ben Hilborn. Then we reboarded the plane for the forty-minute flight to Jackson. Representative Thad Cochran (who was elected Mississippi's first Republican Senator in 1979) was among the notables who met me as I stepped onto the tarmac and escorted me to a luncheon at the Jackson Hilton Hotel. During the luncheon I repeated my assertion that the President was not guilty of an impeachable offense. Had I said otherwise at that moment, the whole house of cards might have collapsed. (Pl. Ex. 1 p. 21)

Paragraph 12

In justifying the pardon, Ford goes out of his way to assure the reader that "compassion for Nixon as an individual hadn't prompted my decision at all." Rather, he did it because he had "to get the monkey off my back one way or the other."

Manuscript

I knew when I became President that hard decisions would produce some bitter reactions. Still, I wasn't prepared for the allegations that the Nixon pardon prompted. What I had intended to convince my fellow citizens was necessary surgery -- essential if we were to heal our wounded nation -- was being attacked as a "secret deal" that I had worked out with Nixon before he had resigned. And the timing of the announcement -- eleven o'clock on Sunday morning -- was being touted as "proof" of the conspiracy.

Any doubts I might have had about this were dispelled Monday morning. I flew to Pittsburgh where I was scheduled to speak before eight hundred delegates to a conference on urban transportation. "Jail Ford, Jail Ford," some demonstrators shouted, and a workman standing by the airport fence told reporters, "Oh, it was all fixed. He said to Nixon, 'You give me the job, I'll give you the pardon.'" I began to wonder whether, instead of healing the wounds, my decision had only rubbed salt in them.

What made the situation worse was that even some members of my staff failed to understand my motives. Talking to reporters after his resignation, terHorst referred to the

pardon as an "act of mercy." Similarly, Phil Buchen, asked by reporters why I hadn't demanded a confession of guilt by Nixon as a condition of the pardon, replied, "You do not put conditions on an act of mercy." Phil's personal reaction was one of compassion, which was fine and good. But compassion for Nixon as an individual hadn't prompted my decision at all. (Pl. Ex. 1 pp. 265-66)

* * *

The press conference gave me a chance to make a point that I wanted to underline. When a reporter asked if I planned to set up a code of ethics for the Executive Branch, I responded, "The code of ethics that will be followed will be the example that I set." But in general I was disappointed by the questions that were raised. The White House press corps didn't seem interested in finding out how I planned to deal with the substantive issues that confronted me. They just wanted to know what I was going to do about Nixon, and I thought they had wasted my time.

At the conclusion of the press conference, I walked back to the Oval Office and asked my advisers how long they thought this would go on. Was I going to be asked about Nixon's fate every time I met with the press? Each

of them said it would continue as long as Nixon's legal status and the disposition of his papers and tapes remained unclarified. Their scenario was discouraging. I'd been hoping to have press conferences every two or three weeks. I realized now that I'd have to be prepared to answer repeated questions about him and his many legal problems.

Worse, I recognized that the responses I'd already given could -- and probably would be -- variously interpreted. It would also seem to some in the press that I'd made statements that were contradictory. In response to Helen Thomas's question as to whether or not I agreed with Nelson Rockefeller that Nixon should have immunity from prosecution, I had said that I did, adding that "in the last ten days or two weeks I have asked for prayers for guidance on this very important point." But then, in response to another question, I had said that I thought the Special Prosecutor had "an obligation to take whatever action he sees fit and that should include any and all individuals." I realized those two answers seemed at variance with each other, yet I didn't know how to avoid the apparent contradiction. For me to have said that Special Prosecutor Leon Jaworski shouldn't do his duty would have been for me to tell a law enforcement officer to forget about

his oath of office, and I didn't want to make it appear that I was signaling to treat one potential defendant differently from any other.

Then, too, some of my replies seemed to commit me to waiting until after Nixon's trial and conviction before deciding what to do about his case. "In this situation," I had said, "I am the final authority. There have been no charges made, there has been no action by the courts, there has been no action by any jury. And until any legal process has been undertaken, I think it unwise and untimely for me to make any commitment." And again: "I make the final decision. And until it gets to me, I make no commitment one way or another." Clearly, the implication was that if he were convicted I was going to wait until just minutes before Nixon went to jail before -- maybe -- granting him a pardon.

All this forced me to address the issue squarely for the first time. I had to get the monkey off my back one way or another. I was already struggling with the question of who had jurisdiction over the papers and tapes, and that was becoming more and more time consuming every day, intruding into time that I needed in order to deal with the economy, the Cyprus problem, the reorganization of the White House staff, a Congress that

was rushing legislation through the mill in order to adjourn in October and an upcoming fall campaign that -- barring a miracle -- would turn out to be a disaster for Republicans. I simply couldn't listen to lawyers' endless about Nixon's tapes and documents or answer constant questions about his legal status. But just what should -- and could -- I do? (Pl. Ex. 1 pp. 234-36)

Paragraph 13

The precipitating factor in his decision was a series of secret meetings his general counsel, Phil Buchen, held with Watergate Special Prosecutor Leon Jaworski in the Jefferson Hotel, where they were both staying at the time. Ford attributes Jaworski with providing some "crucial" information -- i.e., that Nixon was under investigation in ten separate areas, and that the court process could "take years." Ford cites a memorandum from Jaworski's assistant, Henry S. Ruth, Jr., as being especially persuasive. Ruth had written:

> "If you decide to recommend indictment I think it is fair and proper to notify Jack Miller and the White House sufficiently in advance so that pardon action could be taken before the indictment." He went on to say: "One can make a strong argument for

> leniency and if President Ford is so inclined, I think he ought to do it early rather than late."

Manuscript

For the past several days, Buchen had also been meeting with Jaworski. Their contacts had been facilitated by the fact that both men were staying at the Jefferson Hotel. They could shuttle between floors without attracting undue attention. Jaworski never said so, but it became obvious to Phil that he thought the grand jury would indict Nixon soon. (After all, Phil remembered, the grand jury had named Nixon as an unindicted co-conspirator in the Watergate cover-up several months before.) Then, on the afternoon of September 4, Jaworski gave Phil several crucial pieces of information. The first was a letter in which he expressed his opinion as to how long it would take -- assuming Nixon was indicted -- before a trial could begin.

"The factual situation regarding a trial of Richard M. Nixon within constitutional bounds is unprecedented," the Special Prosecutor wrote. "It is especially unique in view of the recent House Judiciary Committee inquiry on impeachment, resulting in a unanimous adverse finding to Richard M. Nixon on the Article involving obstruction of

justice. The massive publicity given the hearings and the findings that ensued, the reversal of judgment of a number of the members of the Republican Party following release of the June 23 tape recording and their statements carried nationwide, and finally, the resignation of Richard M. Nixon require a delay, before selection of a jury is begun, of a period from nine months to a year and perhaps even longer. This judgment is predicated on a review of the decisions of the United States courts involving prejudicial pretrial publicity.

"The Government's decision to pursue impeachment proceedings and the tremendous volume of television, radio and newspaper coverage given thereto are factors emphasized by the courts in weighing the time [until] a trial can be had. The complexities involved in the process of selecting a jury and the time it will take to complete the process I find it difficult to estimate at this time.

"The situation regarding Richard M. Nixon is readily distinguishable from the facts involved in the case of United States v. Mitchell, et al. The defendants in the Mitchell case were indicted by a grand jury operating in secret session. They will be called to trial, unlike Richard M. Nixon, if indicted, without any

adverse finding by an investigatory body holding public hearings on its conclusions. It is precisely the condemnation of Richard M. Nixon already made in the impeachment process that would make it unfair to the defendants in the case of United States v. Mitchell, et al., for Richard M. Nixon now to be joined as a co-conspirator should it be concluded that an indictment of him was proper.

"The United States v. Mitchell, et al., trial will within itself generate new publicity, some undoubtedly prejudicial to Richard M. Nixon. I bear this in mind when I estimate the earliest time of trial of Richard M. Nixon, under his constitutional guarantees, in the event of indictment, to be as indicated above."

Shortly after four o'clock on the afternoon of September 5, Buchen and Becker came into the Oval Office and showed me Jaworski's opinion. It was worrisome. Even if a full year elapsed before a trial could begin, there was no telling how long it would last. And if the verdict was Guilty, one had to assume that Nixon would appeal. That process would take years. Of equal concern to me was a memorandum which the Special Prosecutor had attached. It was from Henry S. Ruth, Jr., Jaworski's deputy, and it listed ten areas

of investigation that prosecutors were pursuing. (Among them: tax deductions relating to the gift of Nixon's Vice Presidential papers, misuse of the IRS through attempted initiation of audits of Nixon's "enemies," and the handling of campaign contributions by Bebe Rebozo for Nixon's personal benefit.)

"None of these matters at the moment rises to the level of our ability to prove even a probable criminal violation by Mr. Nixon," Ruth's memo continued, "but I thought you ought to know which of the pending investigations were even remotely connected to Mr. Nixon. Of course, the Watergate cover-up is the subject of a separate memorandum."

Ruth, of course, had given Jaworski his own recommendations: "If you decide to recommend indictment, I think it fair and proper to notify Jack Miller and the White House sufficiently in advance so that pardon action could be taken before indictment." He went on to say: "One can make a strong argument for leniency, and if President Ford is so inclined, I think he ought to do it early rather than late." That influenced me because Ruth knew as much about Watergate as anyone. He was simply putting the nation's interests first. Which was precisely what I would have to do. (Pl. Ex. 1 pp. 246-49).

Paragraph 14

Ford decided that court proceedings against Nixon might take six years, that Nixon "would not spend time quietly in San Clemente," and "it would be virtually impossible for me to direct public attention on anything else."

Paragraph 15

Buchen, Haig and Henry Kissinger agreed with him. Hartmann was not so sure.

Manuscript

Over the next few days, I agonized over the idea of a pardon, and eventually several key conclusions solidified in my mind.

First of all, I simply was not convinced that the country wanted to see an ex-President behind bars. We are not a vengeful people; forgiveness is one of the roots of the American tradition. And Nixon, in my opinion, had already suffered enormously. His resignation was an implicit admission of guilt, and he would have to carry forever the burden of his disgrace. But I wasn't motivated primarily by sympathy for his plight or by concern over the state of his health. It was the state of the country's health at home and

around the world that worried me. As Army Major Bob Barrett, one of my military aides, said: "We're all Watergate junkies. Some of us are mainlining, some are sniffing, some are lacing it with something else, but all of us are addicted. This will go on and on unless someone steps in and says that we, as a nation, must go cold turkey. Otherwise, we will die of an overdose."

"Among the deficiencies of hindsight," Winston Churchill once wrote, "is that while we know the consequences of what was done, we do not know the consequences of some other course that was not followed." Yet I was very sure of what would happen if I let the charges against Nixon run their legal course. Months were sure to elapse between an indictment and trial. The entire process would no doubt require years: a minimum of two, a maximum of six. And Nixon would not spend time quietly in San Clemente. He would be fighting for his freedom, taking his cause to the people, and his constant struggle would have dominated the news. The story would overshadow everything else.

No other issue could compete with the drama of a former President trying to stay out of jail. It would be virtually impossible for me to direct public attention on anything

else. Passions on both sides would be aroused. A period of such prolonged vituperation and recrimination would be disastrous for the nation. America needed recovery, not revenge. The hate had to be drained and the healing begun.

Keeping all these thoughts to myself, I broached the possibility of a pardon with five key aides: Buchen, Haig, Kissinger, Hartmann and Marsh. I swore each of them to secrecy, emphasizing that there simply could not be any leaks until I had reached a decision. I urged them to give me their most candid feelings. Buchen, I knew already, was inclined to favor the idea. Haig was for it too, although he never flatly said as much. He laid out the pros and cons, then stepped back and said, "It's your decision, sir." When I talked to Kissinger at one of our private morning meetings, he said he thought it was the right thing to do. It was the quickest, really the only way to clear the center stage. The spectacle of a former President on trial would damage our country's image internationally. It was a very impressive argument.

However, Hartmann and Marsh had reservations. Neither argued its equity; nor disputed my view that this was the only way to get the matter behind us once and for all. Both simply considered it their job to present alternatives. "Mr.

President," Hartmann said, "you'll have to expect a lot of flack. No one can predict just how deep the resentment will go, but there will be strong editorial condemnation for sure. There will be all hell to pay with the news media, and the White House press corps will go up the wall."

"I know that," I replied, "but the press is going to react that way whenever I announce the decision, so it might as well be now."

Hartmann shifted to another tack. Mentioning a recent survey which showed that 56 percent of people interviewed thought Nixon ought to be tried, he warned that the pardon would damage me politically. "Your popularity in the opinion polls will be undercut because the public won't understand. I know why you want to do it, but you should be cognizant of the down side."

"I'm aware of that," I said. "It could easily cost me the next election if I run again. But damn it, I don't need the polls to tell me whether I'm right or wrong."

For Marsh the important question was the timing. He felt the country wasn't ready for it yet and urged me to delay the announcement for several weeks. When he saw he wasn't making

headway, he suggested that I lay the groundwork by notifying the key leaders on Capitol Hill and asking them to keep the secret until I decided to act. But that, I thought, would increase the possibility of a leak to the press, and a leak would be calamitous. Then Marsh mentioned something else. "Look," he said, "both of us know about the meeting with Haig that took place on Thursday, August 1 -- the meeting where he discussed a pardon as one of several options available at the time. Although you and I understand the two are not related, will people try to connect them?"

"Maybe they will, but we both know the facts," I replied. (Pl. Ex. 1 pp. 237-41)

Paragraph 16

Buchen wanted to condition the pardon on Nixon agreeing to settle the question of who would retain custody and control over the tapes and Presidential papers that might be relevant to various Watergate proceedings, but Ford was reluctant to do that.

Paragraph 17

At one point a plan was considered whereby the Presidential

materials would be kept in a vault at a Federal facility near San Clemente, but the vault would require two keys to open it. One would be retained by the General Services Administration, the other by Richard Nixon.

Manuscript

So I had the legal authority to move ahead. I hadn't made a final decision, but it must have been obvious to Phil that I was leaning toward a pardon. "Look," he said, "if you're going to do this to put Watergate behind you, I think you also ought to let me see how far we can go to get an agreement on the papers and tapes and have that in place at the same time."

"Well," I said, "if you can get the papers and tapes question settled prior to the pardon, that's fine. Let's get it behind us. But I don't want to condition the pardon on his making an agreement on the papers and tapes, and I don't want you to insist on any particular terms."

"I won't condition it," Phil replied, "but I can work it out so by his agreement it'll come out at the same time."

The issue was far more complex than it appeared. Stored in the White House and the EOB were some 950 reels

of tape and roughly 46 million pieces of paper. By both tradition and rulings by various Attorneys General, those tapes and papers were the property of the former President. (On August 22, to make doubly sure of this, I had asked Attorney General Saxbe to give me a legal opinion. "To conclude that such materials are not the property of (Nixon) would be to reverse what has apparently been the almost unvaried understanding of all three branches of the government since the beginning of the Republic," he decided, "and to call into question the practices of our Presidents since the earliest times." He recommended that I send everything out to Nixon; the members of the transition team concurred.) And Nixon wanted them desperately. He had already been served with a subpoena to appear as a witness in the trials of Mitchell, Haldeman, Ehrlichman and the other Watergate defendants. That trial was due to begin September 30. He had a legitimate need to review his records and tapes in order to prepare his testimony.

But Jaworski also had an interest in seeing the materials. So did the various Watergate defendants. Additionally, attorneys involved in a number of civil suits had issued subpoenas to the White House asking us to produce tapes and records relating to the matters under litigation in each of these separate suits.

Somehow, we had to satisfy these competing claims and do so in such a way as to reassure the public -- in light of the eighteen and one-half minute gap on one of the crucial tapes -- that nothing would be altered or destroyed.

The problem appeared to defy a solution. And, in a literally physical sense, it was getting worse. The packaging, boxing and storing of the materials was taking place on the fourth floor of the EOB. As the process continued, the Secret Service, in a confidential memorandum, expressed worry over the floor's ability to withstand the extra weight. But early in the week of August 26, the possibility of a solution emerged when Nixon retained Herbert J. ("Jack") Miller as his attorney. That at least opened an avenue of communication between Buchen and the former President that had not existed before.

After discussing the problem with Miller, Buchen and Becker came up with the concept of a Presidential deed of gift of the papers and tapes to the United States. Under this proposal, the documents would be stored at a federal facility near San Clemente. Nixon and the government would share formal ownership and the materials would be available for court subpoenas for between three and five years. To

ensure their security, two keys would be needed to open the vault. Nixon would have one, the General Services Administration the other. After five years had elapsed, Nixon could order the tapes destroyed. Miller didn't know if Nixon would accept the plan, but he would prepare a draft of a letter from the former President to GSA Administrator Arthur Sampson which he hoped expressed agreement with the concept. (Pl. Ex. 1 pp. 243-45)

Paragraph 18

The White House did, however, want Nixon to make a full confession on the occasion of his pardon or, at a minimum, express true contrition. Ford tells of the negotiation with Jack Miller, Nixon's lawyer, over the wording of Nixon's statement. But as Ford reports Miller's response, Nixon was not likely to yield. "His few meetings with his client had shown him that the former President's ability to discuss Watergate objectively was almost nonexistent."

Manuscript

On Wednesday, September 4, Buchen and Becker met with Miller to discuss the wording of that letter. At one point, Buchen said: "President Ford is giving some consideration to pardoning your client. It's just in the consideration stage, and by no means do I

want you or your client to get excited because it's not a final decision yet." Then Phil added: "Look, I think it's important that there be a statement of true contrition from the former President. The President tells me we can't dictate that statement, but in the interests of both your client and the President, I hope you would persuade your client to develop something that would tell the world, 'Yes, he did it, and he's accepting the pardon because he's guilty.'"

Miller said he understood and volunteered his belief that if the pardon were granted, Nixon should issue a statement admitting his involvement in Watergate. But he wasn't optimistic about getting such a statement. His few meetings with his client had shown him that the former President's ability to discuss Watergate objectively was almost nonexistent. Buchen and Becker then said that if and when the pardon was issued, it would be without preconditions, that while we'd welcome a statement of contrition, we weren't demanding one. (Pl. Ex. 1 pp. 245-46)

Paragraph 19

The statement they really wanted was never forthcoming. As soon as Ford's emissary arrived in San Clemente, he was confronted with

an ultimatum by Ron Ziegler, Nixon's former press secretary. "Let's get one thing straight immediately," Ziegler said. "President Nixon is not issuing any statement whatsoever regarding Watergate, whether Jerry Ford pardons him or not." Ziegler proposed a draft, which was turned down on the ground that "no statement would be better than that." They went through three more drafts before they agreed on the statement Nixon finally made, which stopped far short of a full confession.

Paragraph 20

When Ford aide Benton Becker tried to explain to Nixon that acceptance of a pardon was an admission of guilt, he felt the President wasn't really listening. Instead, Nixon wanted to talk about the Washington Redskins. And when Becker left, Nixon pressed on him some cuff links and a tiepin "out of my own jewelry box."

Manuscript

Becker was the obvious choice. I had full confidence in his judgment, his legal expertise and his loyalty to me. Haig arranged for an Air Force jet to fly Becker and Miller to California. Now Phil and I reviewed Becker's mission with him. He was to negotiate an agreement covering

the papers and tapes and to review any response Nixon might give in the event I decided to pardon him. He was authorized to say, "It's not final, but in all probability, a pardon will be forthcoming." He stood up to leave, and I walked with him to the Oval Office door. I put my arm around his shoulder. "Be very firm out there and tell me what you see," I said.

The story Becker told me upon his return to Washington on Saturday was poignant. No sooner had he arrived in San Clemente very late Thursday night than Ron Ziegler had confronted him with an ultimatum. "Let's get one thing straight immediately," Ziegler said. "President Nixon is not issuing any statement whatsoever regarding Watergate, whether Jerry Ford pardons him or not." There it was, the same defiant attitude he had expressed so often during his years as press secretary, the reference to Nixon as if he still were President and the familiar, condescending use of my first name. As soon as he heard that, Becker threatened to turn around and leave; in fact, he asked Ziegler how to contact the pilot of the plane that had flown him to California. But Miller succeeded in calming both men down, and they agreed to meet the next morning.

Negotiations that day centered mainly on the papers and tapes. By

midafternoon a compromise had been reached. It gave both Nixon and the government access to the materials but stipulated that only he could authorize the Special Prosecutor or anyone else to examine them. Becker telephoned Buchen, who informed me of the details. Both of them seemed convinced that it was the best arrangement we could obtain. On their recommendations, I decided to accept it. The discussions in San Clemente then turned to the response Nixon would make if he received a pardon. The first draft that Ziegler prepared for Becker was disastrous. It spoke of the pressures of the office of the President, the necessity for reliance upon the judgment and the honesty of the White House staff and the President's preoccupation with international affairs. It concluded by acknowledging that Nixon should have delegated less authority to -- and placed less reliance on -- the members of his staff. That was all. When Ziegler asked Becker what he thought of it, Becker replied that no statement would be better than that. He stressed that although a satisfactory statement was not a pre-condition for a pardon, he thought that Ziegler could do a better job.

Ziegler went through three more drafts. In the final one, the former President said: "I have been informed that President Ford has granted me a

full and absolute pardon for any charges which might be brought against me for actions taken during the time I was President of the United States. In accepting this pardon, I hope that his compassionate act will contribute to lifting the burden of Watergate from our country.

"Here in California, my perspective on Watergate is quite different than it was while I was embattled in the midst of the controversy and while I was still subject to the unrelenting daily demands of the Presidency itself.

"Looking back on what is still in my mind, a complex and confusing maze of events, decisions, pressures and personalities, one thing I can see clearly now is that I was wrong in not acting more decisively and more forthrightly in dealing with Watergate, particularly when it reached the stage of judicial proceedings and grew from a political scandal into a national tragedy.

"No words can describe the depth of my regret and pain at the anguish of my mistakes over Watergate have caused the nation and the Presidency -- a nation I so deeply love and an institution I so greatly respect.

"I know that many fair-minded people believe that my motivations

and actions in the Watergate affair were intentionally self-serving and illegal. I now understand how my own mistakes and misjudgments have contributed to that belief and seemed to support it. This burden is the heaviest one of all to bear.

"That the way I tried to deal with Watergate was the wrong way is a burden I shall bear for every day of the life that is left to me."

Becker wasn't satisfied. It wasn't the "full confession" he'd been hoping the former President would make, and he suspected that it would fall far short of what I wanted Nixon to say. Still, reasoning that Nixon had said about as much as he was going to say he told Ziegler that he'd take the draft back to Washington and see if it would pass muster there. Then, remembering my final instructions, he asked to see Nixon personally. Ziegler refused, but Miller intervened and said he saw no harm in the meeting. "All right," Ziegler said finally, "you can go on in."

The office was very small and looked as though someone had just moved in. There were no pictures on the walls. There was just a desk flanked by the U.S. and Presidential flags. Nixon sat behind that desk and, Becker later told me, he looked terrible. He appeared to have aged

and shrunken in the month since his resignation. His jowls were loose and flabby, but his shirt seemed to be too big for his neck. Nixon didn't smoke, but his fingernails had a yellowish tint. His handshake was very weak, and Becker noticed that he wasn't wearing the customary American flag pin in the lapel of his suit. "Mr. President," Becker began, "your aides and I have accomplished some very good objectives for the nation and for you today with respect to your papers. President Ford doesn't wish to deny you your papers, nor does President Ford wish to deny access to other people."

Nixon made no response. Becker noticed that he was slouched in his chair, that the expression on his face seemed to be saying, "Leave me alone," and that he didn't seem to be following the conversation. It was almost as if he had lost the will to live. Then Becker turned to the pardon: "I'm sure that Mr. Miller and Mr. Ziegler have told you that President Ford is considering a pardon, and I know they've showed you a draft of the document. Now, there are certain things you should know about pardons, and I should satisfy myself that you do know them."

What Becker wanted to do was to explain the Burdick case of 1915 and restate the White House view that

acceptance of a pardon was an acknowledgment of guilt. But Nixon didn't seem to want to talk about that. He must have thought Becker came from Grand Rapids because he was surprised to learn that he lived in Washington. When Becker told him that, the former President asked, "How are the Redskins going to do this year?"

"I really don't know, Mr. President," Becker replied. "We have some important things to talk about. Let's talk about them." Once again he made the point that an acceptance of the pardon constituted an admission of guilt.

"Uh-huh," Nixon replied.

His attention span was short. What few remarks he made were left unfinished, in mid-sentence. After twenty minutes or so, Becker was finished with what had turned out to be a monologue. He left the office and, with Miller, waited for the car that would drive them away from San Clemente. Just then, Ziegler called him back and said that Nixon wanted to see him again.

Nixon seemed exhausted. "You've been a fine young man," he told Becker. "You've been a gentleman. We've had enough bullies." His voice faltered, and for a moment he looked away. "I want to give you something.

But look around the office. I don't have anything any more. They took it all away from me."

Becker felt very uncomfortable. "That's all right, Mr. President," he began.

"No, no, no," Nixon went on. "I asked Pat to get these for me." He opened a desk drawer and pulled out two little boxes containing cuff links and a tie pin. "She got these out of my own jewelry box," Nixon continued. "There aren't any more in the whole world. I want you to have them."

Becker took the boxes, shook Nixon's hand again and left the room as quickly as he could. Any more, he told me when he returned to Washington, and he would have broken down and started to cry himself. "I'm not a medical doctor," he told me, "but I really have serious questions in my mind whether that man is going to be alive at the time of the election."

"Well," I replied, "1976 is a long time away."

"I don't mean 1976," Becker said. "I mean 1974." (Pl. Ex. 1 pp. 249-54)

Paragraph 21

> Ultimately, Ford sums up the philosophy underlying his decision as one he picked up as a student at Yale Law School many years before. "I learned that public policy often took precedence over a rule of law. Although I respected the tenet that no man should be above the law, public policy demanded that I put Nixon -- and Watergate -- behind us as quickly as possible."

Manuscript

I especially wanted it understood that my fundamental decision to grant a pardon had nothing to do with any sympathy I might feel for Nixon personally or any concern I might have for the state of his health. Years before, at Yale Law School, I'd learned that public policy often took precedence over a rule of law. Although I respected the tenet that no man should be above the law, public policy demanded that I put Nixon -- and Watergate -- behind us as quickly as possible. The successful conclusion of the agreement concerning the papers and tapes together with the statement Becker had secured from Nixon persuaded me to act as soon as possible. You can't pull a bandage off slowly, and I was convinced that the sooner I issued the pardon, the better it would be for the country. I decided to make the announcement Sunday morning. (Pl. Ex. 1 p. 256)

Paragraph 22

Later, when Ford learned that Nixon's phlebitis had acted up and his health was seriously impaired, he debated whether to pay the ailing former President a visit. "If I made the trip it would remind everybody of Watergate and the pardon. If I didn't, people would say I lacked compassion." Ford went:

> "He was stretched out flat on his back. There were tubes in his nose and mouth, and wires led from his arms, chest and legs to machines with orange lights that blinked on and off. His face was ashen, and I thought I had never seen anyone closer to death."

Manuscript

Late in October, Richard Nixon's health took a turn for the worse. The phlebitis in his left leg created blood clots that threatened his life, and doctors decided to operate. After the operation he went into shock, and doctors said his condition was critical. On October 31, I flew to Los Angeles to speak at a dinner for Republican candidates at the Century Plaza Hotel. My staff debated whether or not I ought to visit Nixon at the Long Beach Hospital, only half an hour away. If I made the trip, it would remind everyone of Watergate and the

pardon. If I didn't, people would say I lacked compassion. I ended their debate as soon as I found out that it had begun. Of course I would go. Before dinner that evening, I telephoned Pat and asked how her husband was doing. "I don't want to push it," I said, "but would it help if I came down there?"

"Oh, there's nothing he'd like more," she replied.

Next morning, November 1, we helicoptered to the Long Beach airport, then drove to the hospital, where I talked to Nixon's physician, Dr. John Lundgren. The former President, Lundgren said, was a very sick man. I could see him, but I had to be very quiet, and I couldn't say anything that might upset him.

The hospital had just opened a new wing, and Nixon was the only patient there. I took the elevator to the seventh floor, where Pat, Julie and Tricia greeted me effusively. Then, with Lundgren, I stepped toward Nixon's room. An attendant tried to open the door. He couldn't. Incredibly, the lock was jammed. It wouldn't respond to our frantic efforts and we had to wait five minutes while someone fetched an expert. I shuddered to think what might have happened had Nixon taken a sudden turn for the worse.

When I stepped into the room and saw Nixon's condition, I was even more shocked than I had been by the delay in opening that door. He was stretched out flat on his back. There were tubes in his nose and mouth, and wires led from his arms, chest and legs to machines with orange lights that blinked on and off. His face was ashen, and I thought I had never seen anyone closer to death. He opened his eyes and said, "Hi, Jerry," in a voice that was barely audible. Then we shook hands. We talked about generalities and the fall campaign. I told him the party had a good chance on election day. I wanted to tell him more, but I realized how difficult it was for him to respond to me. He couldn't keep his eyes open, and his voice was as soft as a whisper. "My own situation . . . " he said very slowly. "I'm not feeling too well, but I'm going to make it." And then, as I was preparing to leave: "Mr. President, this has meant a lot to me. I'm deeply grateful." (Pl. Ex. 1 pp. 298-99)

Paragraph 23

The manuscript made available to The Nation includes many references to Henry Kissinger and other personalities who played a major role during the Ford years.

Paragraph 24

On Kissinger. Immediately after being informed by Nixon of his intention to resign, Ford returned to the Executive Office Building and phoned Henry Kissinger to let him know how he felt. "Henry," he said, "I need you. The country needs you. I want you to stay, I'll do everything I can to work with you."

Paragraph 25

"Sir," Kissinger replied, "it is my job to get along with you and not yours to get along with me."

Paragraph 26

"We'll get along," Ford said. "I know we'll get along." Referring to Kissinger's joint jobs as Secretary of State and National Security Adviser to the President, Ford said, "I don't want to make any change. I think it's worked out well, so let's keep it that way."

Manuscript

I had heard rumors that the discussions among members of the Nixon family about resignation had been volatile, but in our meeting the President never brought it up. He had made his decision. It was over as far as he was concerned, and his only

interest now was to foster a smooth and orderly transition. After seventy minutes we had touched every base and it was time for me to leave. As we walked toward the doors, Nixon put his arm around me. "Here's an old friend who's made a major decision changing both our lives," I said to myself. "Now he's wishing me the best not only for myself but for the country." I couldn't be very eloquent because my emotions were too strong. There was a choking in my throat.

"Well," I said, "I'll see you tomorrow. Give Pat and the family my best." Even those low-key words didn't come out easily.

"You and Betty will enjoy living in the mansion," the President replied. "We'll see you tomorrow."

We shook hands again, and I walked the forty yards to the limousine waiting in the driveway. I never once glanced back. Nor did I look at the Secret Service agents accompanying me, because I was afraid my feelings might show. I stared ahead at the car, and I wanted the agents to open the door as soon as possible so I could climb inside. I needed to be alone.

But that, I knew, would be impossible, for there were still too

many things to do. As soon as I returned to the EOB, I telephoned Kissinger. I thought it was urgent to tell him right away how I felt about him. "Henry," I said when he came on the line, "I need you. The country needs you. I want you to stay. I'll do everything I can to work with you."

"There will be no problem," he replied in his deep, accented voice. "Sir, it is my job to get along with you and not yours to get along with me."

"We'll get along," I said. "I know we can get along." We talked about the two hats he wore, as Secretary of State and National Security Adviser to the President. "I don't want to make any change," I said. "I think it's worked out well, so let's keep it that way." (Pl. Ex. 1 pp. 45-46)

Paragraph 27

Later Ford did make the change and relieved Kissinger of his responsibilities as National Security Adviser at the same time that he fired James Schlesinger as Secretary of Defense. Shortly thereafter, he reports, Kissinger presented him with a "draft" letter of resignation, which he said Ford could call upon at will if he felt he needed it to quiet

dissent from conservatives who objected to Kissinger's role in the firing of Schlesinger.

Manuscript

One of the recommendations that the transition team gave me after I became President was that Henry Kissinger should wear only one hat; to expect him to function effectively both as Secretary of State and as National Security Adviser to the President was to ask too much of any one man. At the time, I hadn't gone along with that view. Henry wanted to keep both positions, and I didn't want to make any changes that might be misunderstood overseas. Over the next 15 months, however, I became convinced that Henry ought to concentrate on the Department of State and foreign policy; he shouldn't have to worry about the mechanics of the NSC.

Those concerns, I thought, belonged rightfully to Air Force Lieutenant General Brent Scowcroft, who for nearly three years had served as deputy national security adviser to the President. Although he was a West Point graduate, Scowcroft hardly fit the Hollywood stereotype of a fighting man. He was thin, short and balding. Unfailingly polite, he never raised his voice. If he was really upset about something, he might say, "Gosh," but that was the strongest four-letter

word I had ever heard him use. He didn't smoke or drink. Yet his unremarkable appearance and mild manner belied a fine service record and a first-rate intellect. He had worn a fighter pilot's wings since 1948; he had earned a master's degree and a Ph.D. in international relations at Columbia. He had taught Soviet history at West Point, and he spoke both Russian and Serbian. He and Henry thought alike. I knew that their excellent relationship would continue even after I asked Brent to wear Henry's second hat. (Pl. Ex. 1 pp. 491-92)

* * *

On Saturday afternoon, October 25, I called Kissinger and Rumsfeld into the Oval Office and explained what I wanted to do. The only way I could feel comfortable with my own team in place, I said, was to fire Schlesinger, ask Colby to submit his resignation, bring Bush back as director of the CIA, send Rumsfeld over to Defense, take away one of Kissinger's two hats and upgrade both Cheney and Scowcroft.

Both Kissinger and Rumsfeld seemed stunned by the sweeping nature of the changes. Both expressed doubts. I was firing Schlesinger only because of my personal animosity toward him, Henry said. The political

price that I would have to pay would be exorbitant. Therefore, it would be wiser to keep him on for another year. He didn't object to losing his job as National Security Adviser to the President, but he did think it might be misunderstood in foreign capitals. If other countries thought I was downgrading him, it would jeopardize his ability to function effectively as my Secretary of State.

Rumsfeld expressed similar reservations about the many changes. My own credibility was at stake, he pointed out. I had said publicly that my Cabinet was set. Now here I was about to fire Schlesinger. He was equally unhappy about my decision to send him over to Defense.

I replied affirmatively to each of these objections. Defense, I told Rumsfeld, was the place he ought to go. With his experience and ability, he could convince Congress to appropriate necessary funds for the military. At the end of the meeting, Henry said he would accept my decisions. Rumsfeld wanted to think it over and talk with me the next day. (Pl. Ex. 1 pp. 494-95)

* * *

While I was defending the budget Henry Kissinger was in Moscow making another attempt to reach agreement

on SALT II. We were also seeking to get the Soviets to reduce their involvement in the Angolan civil war. Both of us were aware that this would probably be our last chance to achieve an arms accord in 1976. As the nomination and election approached, partisanship would flourish, making it impossible to discuss complex issues like SALT in a rational way. So Henry really wanted the Moscow talks to succeed. For a variety of reasons, most of them unfair, he had been going through exceedingly difficult times. Early in January, in fact, he had come into the Oval Office and handed me a "draft" of his letter of resignation as Secretary of State. His motivation, he explained, was political. Conservatives still blamed him for my dismissal of Schlesinger, although he had had nothing to do with it. That made him a liability to me in an election year. Unselfishly, in order not to embarrass me, he would step aside. Pointing to the letter, he said, "This is what I'll send you if my resignation will help."

I was shocked by the idea. His resignation was something I simply couldn't accept. The country needed him -- I needed him -- to implement our foreign policy at this difficult time. (Pl. Ex. 1 pp. 536-37)

Paragraph 28

On John Connally. When Ford was informed that Nixon wanted him to replace Agnew, he told the President he had "no ambition to hold office after January 1977." Nixon replied that that was good since his own choice for his running mate in 1976 was John Connally. "He'd be excellent," observed Nixon. Ford says he had "no problem with that."

Manuscript

On Thursday morning, October 11, Nixon met with the Congressional leadership to discuss the procedures that he wanted to follow in making his nomination. "I'd like to be in the shape with the American public that Jerry Ford is," he joshed, but I didn't take him seriously. Next morning, however, Haig asked me to come to the Oval Office at eleven o'clock. Hugh Scott accompanied me. He had also received a call, so I assumed that Nixon had some legislative matter that he wanted to discuss. Usually, Scott and I saw the President together, so I was surprised when Haig ushered Scott into the Oval Office alone and asked me to wait outside the door. Minutes later, Scott left; I entered and took the chair to the President's right.

Nixon came directly to the point. Because of the Agnew tragedy, he said, there was an urgent need to restore public confidence in the office of Vice President. He wanted me to be his nominee. Then he asked if I'd made any political plans. I told him about my promise to Betty and said that I had no ambitions to hold office after January 1977. Just because I'd be serving as Vice President for the remainder of his term didn't mean I'd expect to be the Presidential nominee in 1976.

"Well, that's good," Nixon replied, "because John Connally is my choice for 1976. He'd be excellent."

"That's no problem as far as I'm concerned," I said, and told him about my discussions with Connally in Palm Springs several months before. (Pl. Ex. 1 pp. 155-56)

Paragraph 29

On the Decision to Run Again. Ford was, he tells us, so sincere in his intention not to run again that he thought he would announce it and enhance his credibility in the country and the Congress, as well as keep the promise he had made to his wife, Betty.

Paragraph 30

Kissinger talked him out of it. "You can't do that. It would be disastrous from a foreign policy point of view. For the next two and a half years foreign governments would know that they were dealing with a lame-duck President. All our initiatives would be dead in the water, and I wouldn't be able to implement your foreign policy. It would probably have the same consequences in dealing with the Congress on domestic issues. You can't reassert the authority of the Presidency if you leave yourself hanging out on a dead limb. You've got to be an affirmative President."

Manuscript

At about the same time that I was changing Nelson's future political plans, I was also altering my own. Bearing in mind my promise to Betty that I would retire in January 1977, as well as the statements I'd made during my confirmation hearings on Capitol Hill, I was giving serious thought to announcing once again that I would not be a candidate in 1976. If I did that, I thought, my credibility would be enhanced in both Congress and the country at large, and none of the tough decisions that I had to make could be challenged on political grounds. This very logical scenario dismayed Henry Kissinger.

"Mr. President," he said, "you can't do that. It would be disastrous from a foreign policy point of view. For the next two and one-half years foreign governments would know that they were dealing with a lame-duck President. All our initiatives would be dead in the water, and I wouldn't be able to implement your foreign policy. It would probably have the same consequences in dealing with the Congress on domestic issues. You can't reassert the authority of the Presidency if you leave yourself hanging out on a dead limb. You've got to be an affirmative President. You've got to hold off on any announcement like that."

Henry was right. The moment I said I wasn't going to run, the succession struggle would start. That would be divisive in and of itself, and what the country needed was a period of stability. Besides, I relished the challenge of the Presidency, and both Betty and I found that we enjoyed living in the White House -- our clothes and household effects had been moved in during our Chicago trip -- more than we ever thought we would. So on August 21, I authorized Jerry terHorst to tell reporters that I probably would run in 1976. The decision wasn't final then -- I still had Betty to convince -- but the statement enabled me to shed the image of a

caretaker chief executive and to act more persuasively on my own. (Pl. Ex. 1 pp. 216-17)

Paragraph 31

On David Kennerly, the White House photographer. Schlesinger was arguing with Kissinger and Ford over the appropriate response to the seizure of the Mayaguez. At issue was whether airstrikes against the Cambodians were desirable; Schlesinger was opposed to bombings. Following a lull in the conversation, Ford reports, up spoke the 30-year-old White House photographer, David Kennerly, who had been taking pictures for the last hour.

Paragraph 32

"Has anyone considered," Kennerly asked, "that this might be the act of a local Cambodian commander who has just taken it into his own hands to stop any ship that comes by?" Nobody, apparently, had considered it, but following several seconds of silence, Ford tells us, the view carried the day. "Massive airstrikes would constitute overkill," Ford decided. "It would be far better to have Navy jets from the Coral Sea make surgical strikes against specific targets."

Manuscript

At 3:52 on Wednesday afternoon, I convened the fourth and final meeting of the NSC. Mayaguez remained at anchor off Koh Tang island, and we had no new information as to the whereabouts of the crew. Some crewmen, we had to assume, remained aboard ship. Some may have been on the island, while others had been taken to the mainland. Our naval forces now were very close to the scene. Our destroyer escort, Holt, was only a mile or so away. The destroyer Wilson was approaching fast, and Coral Sea was close enough to launch air strikes on the mainland. Air Force General David Jones led off by reviewing the various options on his charts. They ranged all the way from a minimum use of force -- helicoptering Marines to Koh Tang to rescue Mayaguez and her crew and then withdrawing them as soon as possible -- to a maximum display: rescuing the ship and her crew and then "punishing" Cambodia by airstrikes.

And this is where Kissinger and I disagreed with Schlesinger. Our first consideration, of course, was the recovery of the ship and her crew. But Henry and I felt that we had to do more. We didn't want the Cambodians to be in a position to reinforce Koh Tang island once our attack began. We wanted them to know

that we meant business, so we opted for air strikes against the mainland as well. Schlesinger agreed that our first priority should be to rescue the ship and her crew, but he was far less eager to use Mayaguez as an example for Asia and the world. He was concerned that our bombing plans were too extensive. There was a lull in the discussion. Then, from the back of the room, a new voice spoke up. It was Kennerly, who had been taking pictures of us for the past hour or so. Never before during a meeting of this kind had he entered the conversation; I knew he wouldn't have done so now unless what he had to say was important so I listened carefully.

"Has anyone considered," he asked, "that this might be the act of a local Cambodian commander who has just taken it into his own hands to stop any ship that comes by? Has anyone stopped to think that he might not have gotten his orders from Phnom Penh? If that's what has happened, you know, you can blow the whole place away and it's not gonna make any difference. Everyone here has been talking about Cambodia as if it were a traditional government. Like France. We have trouble with France, we just pick up the telephone and call. We know who to talk to. But I was in Cambodia just two weeks ago, and it's not that kind of government at all.

We don't even know who the leadership is. Has anyone considered that?"

For several seconds there was silence in the Cabinet Room. Everyone seemed stunned that this brash photographer who was not yet thirty years old would have the guts to offer an unsolicited opinion to the President, the Vice President, the Secretaries of State and Defense, the Director of the CIA and the Acting Chairman of the Joint Chiefs of Staff. Yet I wasn't surprised, and I was glad to hear his point of view.

The discussion resumed about what our reaction should be. In the event that carrier aircraft couldn't reach their targets on time, B-52 crews on Guam had been placed on alert. Rockefeller favored giving the B-52's the go-ahead. Kissinger preferred carrier strikes if the planes were available, but he was adamant about the need for a strong response. So was Scowcroft. Schlesinger didn't seem to want any bombing at all, either by the B-52's or by the Navy Carrier aircraft. JCS Chairman General S. Brown wanted to hit the mainland, but he didn't want to use the B-52s. The decision was up to me. Subjectively, I felt that what Kennerly had said made a lot of sense. Massive airstrikes would constitute overkill. It would be far better to have Navy jets from

Coral Sea make surgical strikes against specific targets in the vicinity of Kompong Som.

Slightly more than an hour after the meeting began, I started issuing the orders. Holt was to seize and secure Mayaguez. Marines were to attack Koh Tang island, rescue crew members there and destroy any Cambodian units that got in the way. Coral Sea was to launch four air strikes against military installations near Kompong Som, including an oil depot, railroad marshaling yards and the airfield at Ream. The first of these attacks was to occur at 8:45 P.M. E.D.T., to coincide with the estimated time of the capture of the ship. (Pl. Ex. 1 pp. 414-17)

Paragraph 33

On Nixon's Character. Nixon's flaw, according to Ford, was "pride." "A terribly proud man," writes Ford, "he detested weakness in other people. I'd often heard him speak disparagingly of those whom he felt to be soft and expedient. (Curiously, he didn't feel that the press was weak. Reporters, he sensed, were his adversaries. He knew they didn't like him, and he responded with reciprocal disdain.)"

Paragraph 34

Nixon felt disdain for the Democratic leadership of the House, whom he also regarded as weak. According to Ford, "His pride and personal contempt for weakness had overcome his ability to tell the difference between right and wrong," all of which leads Ford to wonder whether Nixon had known in advance about Watergate.

Paragraph 35

On hearing Nixon's resignation speech, which Ford felt lacked an adequate plea for forgiveness, he was persuaded that "Nixon was out of touch with reality."

Manuscript

In writing about a friend, one likes to consider the mutual bonds and good qualities on which the friendship is based. One of our strongest ties was the fact that we came from Middle America (economically if not geographically), and from families that had suffered much during the Depression years. We respected each other because each of us knew that the other had come up the hard way. Both of us were lawyers; both had served as naval officers during World War II. We had similar interests aside from politics:

football, baseball and other sports. Each of us had a wonderful wife and fine children. We understood each other's ambitions in politics -- his to become President of the United States, mine to be elected Speaker of the House. And all the while, our friendship was strengthened by our mutual adherence to the same basic policies both at home and abroad.

Nixon had a brilliant mind, a great sensitivity to the public's political mood and a unique ability to analyze foreign policy issues and act decisively on them. Big decisions were his cup of tea, and his batting average was excellent. But he abhorred details, and rather enjoyed pushing them off on subordinates. And that, it seemed to me, was one of several reasons why he now had to resign.

With all his experience in giving speeches and press conferences, one might have assumed that he was an extrovert. In fact, the opposite was true. He was very shy, a loner in many respects, and he seemed to prefer dealing with paperwork to dealing with people. His oratorical capabilities were the result of his recognition that in order to succeed in politics, he had to be able to speak convincingly before large audiences. His fierce determination and able mind

propelled him toward the highest office in the land.

Most of us have hidden flaws or personality quirks that seldom come to the surface. We control them successfully and resist their exploitation by those around us. In Nixon's case, that flaw was pride. A terribly proud man, he detested weakness in other people. I'd often heard him speak disparagingly of those whom he felt were soft and expedient. (Curiously, he didn't feel that the press was weak. Reporters, he sensed, were his adversaries. He knew they didn't like him, and he responded with reciprocal disdain.) He was very bitter about members of Congress who wanted to cut and run from our obligations in South Vietnam, and he detested those lawmakers who were trying to hamstring his efforts to settle the war from a position of strength. He felt that ever since the days of House Speakers Sam Rayburn and John McCormack and Senate Majority Leader Lyndon Johnson, the Democratic leadership of the Congress had been eroding. Because it had become inherently weak, it was deserving of his contempt. That attitude was reflected in his selection of Bob Haldeman and John Ehrlichman as the White House aides through whom he wanted to deal with the Hill.

It was reflected, too, in his explanations of Watergate. His pride

and personal contempt for weakness had overcome his ability to tell the difference between right and wrong. What some journalists called the "dark side" of his personality had prevailed over his judgment, which was normally sound. And once the course had been set, there was no turning back.

As I sat in our family room I wondered whether he had known in advance about the break-in at the Watergate. I couldn't really believe that he had. The new tapes, however, revealed that he had found out about it soon afterward. And I could see why he felt trapped in a dilemma. Some of the people involved -- John Mitchell, for example, were friends of his, and he didn't want to force them to pay the consequences. His pride was stronger than his recognition that he had made a mistake. He viewed admitting the truth as a sign of weakness, and that was another mistake. (Pl. Ex. 1 pp. 52-54)

* * *

Precisely at nine o'clock, the familiar face appeared on our TV screen. "Good evening," the President began. "This is the thirty-seventh time that I have spoken to you from this office where so many decisions have been made that shaped the history of this nation. . . . Throughout

the long and difficult period of Watergate, I have felt it was my duty to persevere, to make every possible effort to complete the term of office to which you elected me. In the past few days, however, it has become evident to me that I no longer have a strong enough political base in the Congress to justify continuing that effort.

"As long as there was such a base, I felt strongly that it was necessary to see the constitutional process through to its conclusion; that to do otherwise would be unfaithful to the spirit of that deliberately difficult process and a dangerously destabilizing precedent for the future.

"But with the disappearance of that base, I now believe that the constitutional purpose has been served and there is no longer a need for the process to be prolonged.

"I would have preferred to carry through to the finish whatever the personal agony it would have involved, and my family unanimously urged me to do so.

"But the interest of the nation must always come before any personal considerations. From the discussions I have had with Congressional and other leaders, I have concluded that

because of the Watergate matter, I might not have the support of the Congress that I would consider necessary to back the very difficult decisions and carry out the duties of this office in the way the interests of the nation would require.

"I have never been a quitter.

"To leave office before my term is completed is abhorrent to every instinct in my body. But as President, I must put the interest of America first.

"America needs a full-time President and a full-time Congress, particularly at this time with problems we face at home and abroad.

"To continue to fight through the months ahead for my personal vindication would almost totally absorb the time and attention of both the President and the Congress in a period when our entire focus should be on the great issues of peace abroad and prosperity without inflation at home.

"Therefore, I shall resign the Presidency, effective at noon tomorrow.

"Vice President Ford will be sworn in as President at that hour in this office. . . .

"I regret deeply any injuries that may have been done in the course of the events that led to this decision. I would say only that if some of my judgments were wrong -- and some were wrong -- they were made in what I believed at the time to be the best interests of the nation. . . ."

The speech lasted fifteen minutes, and at the end I was convinced that Nixon was out of touch with reality. The fact that he was linking his resignation to the loss of his Congressional base shocked me then and disturbs me still. If he had been more contrite and asked the American people for forgiveness, he would have received a warmer response. Yet he couldn't take that final step, I'm convinced he thought what he said was enough. (Pl. Ex. 1 pp. 55-57)

Paragraph 36

In February of last year, when The Washington Post obtained and printed advance excerpts from H.R. Haldeman's memoir, The Ends Of Power, on the eve of its publication by Times Books, The New York Times called The Post's feat "a second-rate burglary."

Paragraph 37

The Post disagreed, claiming that its coup represented "first-rate enterprise" and arguing that it had

burglarized nothing, that publication of the Haldeman memoir came under the Fair Comment doctrine long recognized by the courts, and that "There is a fundamental journalistic principle here -- a First Amendment principle that was central to the Pentagon Papers case."

Paragraph 38

In the issue of The Nation dated May 5, 1979, our special Spring Books number, we will discuss some of the ethical problems raised by the issue of disclosure.

Manuscript

[None]

ADDENDUM C TO DEFENDANTS' POST-TRIAL MEMORANDUM

Comparison of President Ford's Testimony Before the Hungate Committee with Portions of the Manuscript of "A Time to Heal"

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Fifteen minutes later, Haig arrived at my office on the second floor of the Executive Office Building. . . . [O]ther tapes were scheduled to be delivered to Sirica on Monday, August 5. And those others were the ones that bothered Haig. . . . The new tapes, he said, contained evidence that would contradict Nixon's version of events in the Watergate scandal. . . . And if those transcripts contained the evidence that he'd been told they would, then the President's chances of escaping impeachment in the House of Representatives -- and conviction in	In the early morning of Thursday, August 1, 1974, I had a meeting in my vice presidential office, with Alexander M. Haig, Jr., Chief of Staff for President Nixon. At this meeting, I was told in a general way about fears arising because of additional tape evidence scheduled for delivery to Judge Sirica on Monday, August 5, 1974. I was told that there could be evidence which, when disclosed to the House of Representatives, would likely tip the vote in favor of

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the Senate -- would disappear. (pp. 1-3)*	impeachment. (p. 93)**
Shortly after noon that day, I drove to Capitol Hill. No sooner had I entered my office off the Senate floor than Haig telephoned again. He wanted another meeting as soon as possible	Then shortly after noon, General Haig requested another appointment as promptly as possible. He came to my office about 3:30 p.m. for a meeting that was to last for approximately three-quarters of an hour. Only then did I learn of the damaging nature of a conversation on June 23, 1972, in one of the tapes which was due to go to Judge Sirica
When Haig appeared at 3:30 that afternoon, he looked even more beaten and harassed than he had earlier. Since our morning meeting, he had	

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* Citiations are to Pl.Ex. 1, the manuscript of "A Time To Heal."

** Citations are to Deft.Ex. B, Pardon of Richard M. Nixon, and Related Matters: Hearings Before the Subcomm. on Criminal Justice of House Comm. on the Judiciary, 93rd Cong., 2d Sess. at 90-151 (1974).

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either read the transcripts or heard them discussed in great detail. The tapes made clear that Nixon knew the whole story on June 23, 1972. And when that evidence became public, Nixon's case would disintegrate. In moments of stress, Haig proceeds very deliberately, choosing his words with great care. Now he came to the point: "Are you ready, Mr. Vice President, to assume the Presidency in a short period of time?" (p. 4)	the following Monday. . . . . the critical evidence on the tape of June 23, 1972. General Haig told me he had been told of the new and damaging evidence by lawyers on the White House staff who had firsthand knowledge of what was on the tape. The substance of his conversation was that the new disclosure would be devastating, even catastrophic, insofar as President Nixon was concerned. Based on what he had learned of the conversation on the tape, he wanted to know whether I was prepared to assume the Presidency within a very short period of time. (pp. 93-94)

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Carefully, Haig laid out the options that the "knowledgeable people" on the White House staff had agreed were still available to the President. (p. 304)

The first was that he could try to "ride it out" by letting impeachment take its natural course through the House and the Senate trial, fighting against conviction all the way. His second option was to resign. (p. 304)

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General Haig outlined for me President Nixon's situation as he saw it and different views in the White House as to the courses of action that might be available, and which were being advanced by various people around him on the White House staff. As I recall there were different courses being considered: (p. 93)

(1) Some suggested "riding it out" by letting the impeachment take its course through the House and the Senate trial, fighting all the way against conviction.

(2) Others were urging resignation sooner or later. I was told some people backed the first course

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Here the number of alternatives increased. Under provisions of the 25th Amendment to the Constitution, he could step aside temporarily. He could delay his resignation until further along in the impeachment process. He could try to settle for a censure vote in the Congress. He could pardon himself and everyone else involved in Watergate and then resign. Finally, Haig said that according to some on Nixon's White House staff, Nixon could agree to leave in return for an agreement that the new President -- Gerald Ford -- would pardon him. (p. 5)

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and other people a resignation. . . . (p. 94)

On the resignation issue, there were put forth a number of options which General Haig reviewed with me. As I recall his conversation, various possible options being considered included:

(1) The President temporarily step aside under the 25th Amendment.

(2) Delaying resignation until further along the impeachment process.

(3) Trying first to settle for a censure vote as a means of avoiding either impeachment or a need to resign.

(4) The question of whether

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the President could pardon himself.

(5) Pardoning various Watergate defendants, then himself, followed by resignation.

(6) A pardon to the President himself, should he resign. (p. 93)

[H]e made it very clear that he wasn't recommending any one option over another. . . . Next he asked if I had any suggestions as to courses of action for the President. . . . Because of his references to pardon authority, I did ask Haig about the extent of a President's pardon power.

"It's my understanding from a White House lawyer," Haig replied, "that a President does have authority to

General Haig wanted my views on the various courses of action as well as my attitude on the options of resignation. However, he indicated he was not advocating any of the options. I inquired as to what was the President's pardon power, and he answered that it was his understanding from a White House lawyer that a President did have the authority to grant

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grant a pardon even before criminal action has been taken against an individual." He didn't name the lawyer. Nor did he say whether or not that authority existed before the individual had been indicted. (pp. 5-6)

a pardon even before any criminal action had been taken against an individual, but obviously, he was in no position to have any opinion on a matter of law. (pp. 94-95)

"Well, Al," I replied, "I want some time to think. I want to talk to St. Clair and to Betty." (p. 6)

I told General Haig I had to have some time to think. Further, that I wanted to talk to James St. Clair. I also said I wanted to talk to my wife before giving any response. (p. 95)

Shortly after 8 o'clock the next morning, I met with James St. Clair. . . .

"What's your assessment now?"

"Probably the same as yours," he

Shortly after 8 o'clock the next morning, James St. Clair came to my office. Although he did not spell out in detail the new evidence, there was no question in my mind that he

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said. "Unquestionably, this will lead the House to impeach the President. It'll lead the Senate to convict him. The only question now is: What does he do? Resign or fight it through?"	considered these revelations to be so damaging that impeachment in the House was a certainty and conviction in the Senate a high probability. When I asked Mr. St. Clair if he knew of any other new and damaging evidence besides that on the June 23, 1972, tape, he said "No." (p. 95)
Neither one of us could know his answer then. Quickly I asked St. Clair, "Do you know of any other new or damaging evidence besides what's on the June 23 tapes?"	
"No," he replied. (pp. 14-15)	
Then I told him about the options that Haig had mentioned to me the afternoon before. St. Clair listened quietly, commenting only that he had not been the source of any White House staff opinion about a President's power	When I pointed out to him the various options mentioned to me by General Haig, he told me he had not been the source of any opinion about Presidential pardon power. (p. 95)

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to issue pardons. (p. 15)	
We agreed that the only thing I could do would be to call Haig in the presence of witnesses and button this thing down. Minutes later, Haig was on the line. I had written out in longhand what I wanted to say to him, and I read it slowly so that there could be no ambiguities. "I want you to understand," I said, that I have no intention of recommending what the President should do about resigning or not resigning and that nothing we talked about yesterday afternoon should be given any consideration in whatever decision the President may wish to make."	I decided I should call General Haig the afternoon of August 2. I did make the call late that afternoon and told him I wanted him to understand that I had no intention of recommending what President Nixon should do about resigning or not resigning, and that nothing we talked about the previous afternoon should be given any consideration in whatever decision the President might make. General Haig told me he was in full agreement with this position. (p. 95)

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"I think your position is exactly correct," Haig said. (p. 19)

Of equal concern to me was a memorandum which the Special Prosecutor had attached. It was from Henry S. Ruth, Jr., Jaworski's deputy, and it listed ten areas of investigation that prosecutors were pursuing. . . .

"None of these matters at the moment rises to the level of our ability to prove even a probable criminal violation by Mr. Nixon," Ruth's memo continued, "but I thought you ought to know which of the pending investigations were even remotely connected

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I saw on or shortly after September 4, a copy of a memorandum prepared for Special Prosecutor Jaworski by the Deputy Special Prosecutor, Henry Ruth. A copy of this memorandum had been furnished by Mr. Jaworski to my counsel. . . .

The memorandum lists matters still under investigation which "may prove to have some direct connection to the activities in which Mr. Nixon is personally involved." The Watergate coverup is not included in this list; and the alleged coverup

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to Mr. Nixon. Of course, the Watergate cover-up is the subject of a separate memorandum." (p. 248)

I simply was not convinced that the country wanted to see an ex-President behind bars. We are not a vengeful people; forgiveness is one of the roots of the American tradition. (p. 238)

No other issue could compete with the drama of a former President trying to stay out of jail. It

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is mentioned only as being the subject of a separate memorandum not furnished to me. Of those matters which are listed in the memorandum, it is stated that none of them "at the moment rises to the level of our ability to prove even a probable criminal violation by Mr. Nixon." (p. 96)

I believed the general view of the American people was to spare the former President from a criminal trial. (p. 97)

Shortly afterwards I became greatly concerned that if Mr. Nixon's prosecution and trial were pro-

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would be virtually impossible for me to direct public attention on anything else. Passions on both sides would be aroused. A period of such prolonged vituperation and recrimination would be disastrous for the nation. America needed recovery, not revenge. The hate had to be drained and the healing begun. (pp. 238-239)	longed, the passions generated over a long period of time would seriously disrupt the healing of our country from the wounds of the past. I could see that the new administration could not be effective if it had to operate in the atmosphere of having a former President under prosecution and criminal trial. (p. 97)
Then Phil added: "Look, I think it's important that there be a statement of true contrition from the former President. The President tells me we can't dictate that statement, but in the interests of both your client and the President, I hope you would persuade your client to develop something that	I asked for no confessions or statement of guilt; only a statement in acceptance of the pardon when it was granted. No language was suggested or requested by anyone acting for me, to my knowledge. My counsel advised me that he had told the attorney for Mr. Nixon that

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would tell the world, 'Yes, he did it, and he's accepting the pardon because he's guilty.'"	he believed the statement should be one expressing contrition, and in this respect I was told Mr. Miller concurred. (p. 98)
Miller said he understood and volunteered his belief that if the pardon were granted, Nixon should issue a statement admitting his involvement in Watergate. (p. 246)	